(23,445)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 870.

MARTHA YOUNG, ADMINISTRATRIX OF THE ESTATE OF PETER B. YOUNG, DECEASED, PLAINTIFF IN ERROR,

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX.

	Page
Transcript of record from the district court of the United States for the eastern district of Pennsylvania	1
Docket entries	1
Writ of error	2
Statement of claim	4
Exhibit A—Letters of administration	7
Agreement to amend statement of claim	9
Plea	10
Jury	11
Verdict	11
Bill of exceptions	11
Evidence for plaintiff	12
Testimony of Martha Young	12
William Hammond	18
Harry Young	24
John H. Bartlett	25
Edwin Decker	44
John Carrigan	63
John H. Bartlett (recalled)	83
Plaintiff closes	85
Motion for nonsuit	85
Motion for nonsuit refused	85

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1912.

ment *non obstante veredicto* filed.
Order directing entry of judgment filed.
Order granting exception to refusal of motion for judgment notwithstanding the verdict filed.
Judgment on verdict filed.
" 20 Bill of exceptions filed.
Assignments of error filed.
Petition for writ of error filed.
Order allowing petition for writ of error filed.
Bond sur writ of error in sum of Ten Thousand Eight Hundred and Sixty ($10,860.00) Dollars filed.
1912 April 20 Order approving bond sur writ of error filed.
Writ of error allowed and copy thereof lodged in Clerk's office for adverse party.
Citation allowed and issued.
Citation returned "service accepted" and filed.
Praecepe for transcript of record sur writ of error filed.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judge of the District Court of the United States for the Eastern District of Pennsylvania,

Greeting:

Because in the record and proceedings, as also in

the rendition of the judgment of a plea which is in the said District Court, before you, or some of you between Martha Young, Administratrix of the Estate of Peter B. Young deceased, Plaintiff, and Central Railroad Company of New Jersey, Defendant, a manifest error hath happened, to the great damage of the said Central Railroad Company of New Jersey, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable the Judges of the District Court of the United States, at Philadelphia, the 20th day of April in the year of our Lord one thousand nine hundred and twelve.

(SEAL)

GEORGE BRODBECK,
Deputy Clerk of the District Court of the United States.

Before YOUNG, *J.*

Allowed:—

BY THE COURT.

Attest:—

GEORGE BRODBECK,
Deputy Clerk.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

MARTHA YOUNG, Administratrix Estate Peter B. Young, Dec'd,

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY.

October Sessions, 1911. No. 1538.

PLAINTIFF'S STATEMENT OF CLAIM.
Filed Oct. 11, 1911.

Martha Young, Administratrix aforesaid, says that on and prior to October 9, 1909, Peter B. Young, her husband, was in the employ of the Central Railroad Company of New Jersey, defendant aforesaid, (a corporation doing business and operating its railroad or part thereof in the State of Pennsylvania) in the capacity of engineer of a locomotive engine and freight train thereto attached, owned and operated and controlled by the said defendant company; that at about 8 A. M. at or near Siegfrieds, State of Pennsylvania, the said engine and train, which was being run at the said time and place by said Peter B. Young, was passing eastward on one of the main tracks of the said defendant company at said place at the regular and usual rate of speed and in observance of the rules of the said defendant company; that while the said Peter B. Young was thus running and operating the said engine and train at the time and place aforesaid, the said engine

collided with another engine and train of the said defendant company that through its neglect was occupying the said track or main line, on which said Peter B. Young was running his train at the time and place aforesaid, the said collision being of such violence that the said Peter B. Young was immediately killed by the injuries received in said collision; that the said accident was caused solely by the negligence of the said defendant company in not providing and having in proper operation semaphores and indicators and other means and appliances in customary use by other railroads and which semaphores and indicators and means and appliances the said defendant company by its own neglect failed to have in proper and safe condition; that if the said semaphores, indicators and means and appliances had been in the proper condition and working order, and the said semaphores properly supplied with indicators, the said Peter B. Young would have had ample warning of the other said engine on his said track and the said accident would not have happened.

That the said defendant company was also negligent in not having proper rules and instructions and means and appliances in use and in force at the time of said accident for the direction and guidance of the crew operating the other said engine; that the said defendant company was also negligent because it knew or should have known that the crew of the said engine which collided with the engine operated by the said Peter B. Young was notoriously careless and incompetent and inefficient.

That the said engine and train operated by said Peter B. Young as aforesaid was at the time of the said accident, engaged in conveying freight from the State of Pennsylvania to the State of New Jersey, being engaged in Interstate commerce at the time.

Plaintiff further says that the said Peter B. Young at the time he received the said fatal injuries, was forty-two years of age and was earning about $150 a

month as engineer as aforesaid; that he left surviving him in addition to the said plaintiff, the following children: Mrs. Maud Everett, about 21 years of age, and Harry F. Young, about 19 years of age; that plaintiff on September 14, 1911, was duly appointed Administratrix of the estate of said Peter B. Young by the Register of Wills in and for the County of Carbon, State of Pennsylvania, as will more fully appear by a copy of said Letters hereto attached as Exhibit "A"; wherefore, plaintiff, in her own behalf as well as on behalf of said children for such respective interests as they may have in this suit, brings the same to recover as damages from the said defendant company, for the loss of earnings of the said Peter B. Young and the expenses incurred in his burial etc., the sum of Fifty Thousand Dollars ($50,000).

ULYSSES S. KOONS,
Attorney for Plaintiff.

STATE OF PENNSYLVANIA
COUNTY OF CARBON } ss.

Martha Young, being duly sworn, says that she is the plaintiff aforesaid and that her foregoing statement of claim is true and correct to the best of her knowledge, information and belief.

MARTHA YOUNG.

Sworn to and subscribed before me
this 10th day of October, A. D. 1911.

DOUGLAS CRAIG,
Notary Public.
Commission expires February 23, 1913.

EXHIBIT "A".

COMMONWEALTH OF PENNSYLVANIA
CARBON COUNTY } *ss.*

(SEAL) I, C. Curtis Doak, Register for the Probate of Wills and granting Letters of Administration in and for the County of Carbon in the Commonwealth of Pennsylvania.

To Martha Young, Administratrix,

Greeting:

WHEREAS Peter B. Young, of the Borough of Mauch Chunk, lately died intestate; whose principal residence was, at the time of his decease, within the said County of Carbon; by means whereof the full disposition and power of granting Letters of Administration are manifestly known to belong to me; I therefore desiring the goods, chattels and credits, which were of the said deceased, may be well and truly administered, converted and disposed of according to law, do hereby grant unto you the said Martha Young, full power by the tenor of these presents, to administer the goods, chattels and credits which were of the said deceased, which at the time of his death were owing or did in any way belong to him and to pay the debts in which the said deceased stood obligated, so far forth as the goods, chattels and credits will extend, according to their rate and order of law; especially of making a true and perfect Inventory of all and singular the goods, chattels and credits of the said deceased, which have come or shall come to the hands, possession or knowledge of you, the said Martha Young, or into the hands or possession of any other person or persons for you, and the same, so made to Exhibit in the Register's Office in the County of Carbon within thirty days from the date hereof; and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased at the time of his death, which are now or at

any time after shall come to the hands or possession of you, the said Martha Young, or in the hands or possession of any other person or persons for you, well and truly administer according to law. And I further command and require you to make, or cause to be made, a just and true account of your said administration within one year from the date hereof, or when thereunto legally required, and deliver and pay all the rest and residue of said goods, chattels and credits which shall be found remaining upon your said account, the same being first examined and allowed by the Orphans Court of said County of Carbon, to such person or persons as the said Orphans' Court, by their decree pursuant to law, shall limit and appoint; and that you will well and truly comply with the law of this Commonwealth relating to collateral inheritances and if it shall appear that any last will and testament was made by the said deceased, and the same shall be proved according to law, you will surrender and deliver up these Letters of Administration to be cancelled. And I do hereby ordain, constitute, appoint and depute you the said Martha Young, Administratrix of all and singular the goods, chattels and credits which were of the said deceased, saving harmless and forever indemnifying me, and all other officers, against all persons by reason of your Administration aforesaid, and saving all others their rights &c. in the premises.

IN TESTIMONY WHEREOF I have caused the seal of the said office to be hereunto affixed, dated at Mauch Chunk, in the County of Carbon aforesaid, the 14th day of September in the year of our Lord, one thousand nine hundred and eleven.

Signed: C. CURTIS DOAK,
Register.

J. M. DOAK,
Deputy.

AGREEMENT TO AMEND PLAINTIFF'S STATEMENT.

Filed Dec. 11, 1911.

AND NOW, this 5th day of December, 1911, it is agreed by Counsel for Plaintiff and Defendant respectively, that the Plaintiff's Statement of Claim filed in the foregoing proceeding, shall be and is hereby amended as follows, with the same force and effect as if the amendment had been duly allowed by the said Court:

1. By inserting after "8 A. M." in the ninth line of the first page of the said statement of claim:

"Of October 9, 1909."

2. By striking out the word "solely" in the fifth line (from the top) on page two of plaintiff's said statement of claim.

3. By inserting after the word "indicators" in the fourteenth line (from the top) of page two of said plaintiff's statement of claim, the following:

> "And if the co-employees of said Peter B. Young, the servants and agents of the said defendant company, had not been negligent in the operation of the other said engine,"

4. By striking out the second paragraph on page two of said plaintiff's statement of claim, which said paragraph is as follows:

> "That the said defendant company was also negligent in not having proper rules and instructions and means and appliances in use and in force at the time of said accident for the direction and guidance of the crew operating the other said engine; that the said defendant company was also

negligent because it knew or should have known that the crew of the said engine which collided with the engine operated by the said Peter B. Young was notoriously careless and incompetent and inefficient."

and by inserting in lieu and place thereof, the following:

"That the crew or co-employees of said Peter B. Young, in the employ of said defendant company, were careless and negligent in that they allowed the said engine that collided with the said engine of Peter B. Young to be on his track without giving proper notice and warning to said Peter B. Young or any other member of his crew operating his said engine."

5. By inserting after the last paragraph on the third page of said plaintiff's Statement of Claim, the following:

"That plaintiff brings this suit in accordance with the Act of Congress of the United States, approved the 22nd day of April, A. D. 1908, said Act being also known as the "Federal Employers' Liability Act."

ULYSSES S. KOONS,
Attorney for Plaintiff.

A. G. DICKSON,
Attorney for Defendant.

PLEA.

Filed Sept. 18, 1911.

The defendant pleads "Not Guilty."

A. G. DICKSON,
Attorney for Defendant.

JURY.

And afterwards, to wit, on the 21st day of February, 1912, a jury, being called came, to wit.

Benjamin I. Mechling	Thomas P. Merritt
Morris Keen	Newton R. Turner
Charles C. LaSere	Charles Frick
T. Chalkley Palmer	Charles C. Knox
Nathan D. Yoder	Charles W. Potteiger
George W. Underdown	M. R. Travilla

who were respectively sworn or affirmed to well and truly try the issue joined.

VERDICT.

And afterwards, to wit: on the twenty-third day of February, 1912, the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and assess the damages at Five Thousand Four Hundred and Thirty ($5430.00) Dollars.

BILL OF EXCEPTIONS.

Be it remembered that in the said October Sessions, 1911, came the said Plaintiff into the said Court, and impleaded the said Defendant in a certain plea of Tresspass &c., in which the said Plaintiff declared (*prout narr.*) and the said Defendant pleaded (*prout pleas.*) And thereupon issue was joined between them.

And afterwards, to wit, at a session of said Court, held at Philadelphia, before the Honorable James S. Young, Judge of the said Court, the 21st day of February, 1912, the aforesaid issue between the said parties came to be tried by a Jury of the said County for that

purpose duly impanelled (*prout list of Jurors*), at which day came as well the said Plaintiff as the said Defendant, by their respective Attorneys; and the Jurors of the Jury aforesaid impanelled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said plaintiff and the counsel of the said defendant produced and offered and there was received in evidence the testimony and exhibits set forth in the evidence already duly certified and filed by the said Judge under the Motion for Judgment *n. o. v.* and all of which is made a part of this Bill of Exceptions and is now herein set forth at length and the evidence in the case being closed the learned Judge charged the jury and answered the points of charge presented to him also as hereinafter follows:

Before Hon. James T. Young, *J.*, and a jury.

Present:

U. S. Koons, Esq.,representing the Plaintiff.

Arthur G. Dickson, Esq., representing the Defendant.

PLAINTIFF'S EVIDENCE.

Mrs. Martha Young, having been duly sworn, was examined as follows:

By Mr. Koons:

Q. Your name is Martha Young?

A. Yes, sir.

Q. And where do you live at the present time?

A. Phillipsburg—I am a little mixed up.

Q. Take your time to it. Did you understand my question?

A. Mauch Chunk.

Q. This State?

A. Yes.

Q. How old are you?

A. Forty-four.

Q. Fourty-four years of age?

A. Yes, sir.

Q. What was your husband's name?

A. Peter B. Young.

Q. Since his death you have been appointed administratrix of his estate?

A. Yes, sir.

Q. What was your husband's age at the time of this accident?

A. Forty-one years.

Q. Going on forty-two?

A. Yes, sir.

Q. Was he nearer forty-one or nearer forty-two?

A. Forty-one years, nine months and nine days.

Q. In addition to yourself, who did he leave surviving him? That is, any children?

A. Two.

Q. Their names.

A. Maudie and Harry Young.

Q. Maud Young?

A. Yes.

Q. Is she married?

A. Married, yes, sir.

Q. And what is her full name?

A. Everett.

Q. How old is she?

A. Twenty-one.

Q. Your son Harry, how old is he?

A. Nineteen.

Q. And where do they live?

A. She lives in Mauch Chunk, up in Mauch Chunk, and my son lives with her.

Q. And when you are not working, do you make your home with them?

A. Yes, sir.

Q. You are working in Mauch Chunk, I believe?

A. I live with Frank Bard, the tailor, I keep house for him.

Q. In Mauch Chunk?

A. Yes.

Q. Housekeeper?

A. Yes.

Q. Do you remember the day of this accident, what month and what year?

A. No, sir, I do not.

Q. About how long ago? Can you tell us the day on when Mr. Young was killed?

A. The day that he was killed?

Q. Yes.

A. On Saturday morning, wasn't it?

Q. You must tell us. You are the witness. You just tell us to the best of your knowledge.

A. To the best of my knowledge, on Saturday morning.

Q. And what month in the year?

A. I cannot tell you.

Q. Do you know how many years ago?

A. Three years ago.

Q. When will it be three years?

A. On the 9th of October.

Q. Next?

A. Yes, sir.

Q. Three years next October 9?

A. Yes.

Q. 1909?

A. Yes.

Q. In whose employ was he at the time?

A. The Central.

Q. By the "Central" you mean the Central Railroad of New Jersey?

A. Yes.

Q. The defendant here?

A. Yes, sir.

Q. And in what capacity?

A. Engineer.

Q. And how long had he been in the employ of the Central Railroad of New Jersey as engineer, about?

A. About two years.

Q. And before that what had he been?

A. Fireman.

Q. For the same company?

A. Yes, sir.

Q. How soon did you see your husband after the accident?

A. Not until the morning that he was taken out of the house, about half an hour before he was taken out.

Q. You mean the burial; the day of the burial?

A. Yes, that morning.

Q. You never saw him alive, after he left your house the night before?

A. No.

Q. You saw his dead body a couple of days afterward?

A. Yes, sir.

Q. Can you tell us about what he was earning a month as engineer, on an average, for six months preceding his death; that is, what was the average, about?

A. Well, from one hundred and twenty to one hundred and thirty dollars a month, around there.

Q. That was the average, you say?

A. Yes.

MR. DICKSON: I do not want to object to the lady's statement as to what her husband was earning, but I suppose she only knows it from what he told her. We have got the books here. We can get at the real fact. Perhaps that is the best way to do it.

THE COURT: She can testify what he brought home and gave to her, anyhow.

MR. KOONS: I was going to follow it up by asking her what he brought home, but I have asked them to bring the records so that we would have it exact.

By THE COURT:

Q. I suppose you knew about what his wages were?

MR. KOONS: If Mr. Dickson has it, and will show it to me, and if we think it is correct, we will not quarrel over it, I do not think.

By MR. KOONS:

Q. He brought his wages home to you?

A. Yes, sir.

THE COURT: Mr. Dickson, I suppose there is no controversy about it?

MR. DICKSON: I do not think there is any serious contradiction about it. I thought we ought to have it exact.

By MR. KOONS:

Q. He handed his wages over to you?

A. Yes, sir.

Q. And you say from one hundred and twenty to one hundred and thirty dollars was the average?

A. Yes, when they worked good.

Q. How had he been working during these last six months?

A. He had been working pretty good. He never lost any time.

Q. What were his habits with reference to drink?

A. He did not drink. He was no drinking man.

Q. What was his condition as to health?

A. Good.

Q. He was what size man? Was he a small man or a large man?

A. He was a tall man, a stout man.

THE COURT: What was his age?

MR. KOONS: She said his age was forty-one years nine months and nine days.

THE COURT: At the time of his death.

MR. KOONS: At the time of his death he was close on to forty-two years of age.

By MR. KOONS:

Q. You say he was in good health?

A. Yes, sir.

Q. A strong healthy man?

A. Yes, sir.

Q. And worked steadily?

A. Yes, sir.

Q. How did he provide for his family out of his wages?

A. Good.

Q. You say he handed it over to you?

A. Yes, sir.

Q. What were his habits with reference to spending money on himself?

A. He never spent any. He always came home and gave me the money. And if he told me to keep him some, if I could, I would lay away some for him, and most always kept it for him.

Q. And he was not extravagant as to spending money on himself?

A. No, sir.

Q. Where was it he was buried?

A. Easton.

Q. In Easton?

A. Yes, sir.

Q. That was his old home, was it not?

A. Phillipsburg.

Q. That is right across from Easton?

A. Yes.

Q. Easton is on the Pennsylvania side?

A. Yes, sir.

Q. Phillipsburg is on the Jersey side?

A. Yes, sir.

Q. You had the expenses to pay first from Siegfried?

A. Yes.

Q. Then you had the expenses at Easton, did you not?

A. Yes, sir.

Q. The funeral expenses?

A. Yes.

Q. And what did they amount to, about?

A. His expenses alone came upwards of three hundred dollars.

Q. Upwards of three hundred dollars?

A. Yes.

Q. Those are the funeral expenses?

A. Yes.

Q. Including both places?

A. Yes.

(No cross-examination.)

WILLIAM HAMMOND, having been duly sworn, was examined and testified as follows:

By MR. KOONS:

Q. You are a brother of Mrs. Young?

A. Yes, sir.

Q. And where do you live?

A. I live at the present time in Washington, D. C.

Q. What is your occupation?

A. First-class boilermaker in the United States Navy Yard for this Government.

Q. You did not see this accident to Mr. Young?

A. No, sir.

Q. How shortly after it happened did you get to the place of the accident?

A. The first train for Mauch Chunk on the 10th, the next morning after—that is, about probably quarter to eight o'clock.

Q. And you got to Siegfried at what time?

A. About a quarter to eight, or somewhere in that neighborhood.

Q. In the morning?

A. Yes, sir.

Q. And you saw Mr. Young's body?

A. Yes, sir.

MR. KOONS: I do not want to go into the gruesome details. Mr. Dickson, do you admit that he is dead?

MR. DICKSON: He is dead.

By MR. KOONS:

Q. You saw Mr. Young's body at Siegfried?

A. Yes.

Q. Dead, of course?

A. Yes, sir.

Q. Did you examine the yard or tracks where this accident occurred?

A. Yes, sir; I took a walk up through there.

Q. You took a walk up through there?

A. Yes.

Q. How far north or above that station was that cross-over where the engines collided, about?

A. I should judge about twenty-one hundred feet.

Q. About twenty-one hundred feet?

A. Yes; probably about three-quarters of a mile.

Q. Do you know how many feet there are in a mile?

A. No, sir; I have not figured it up.

Q. Which is your judgment, twenty-one hundred feet or three-quarters of a mile?

A. About three-quarters of a mile. That is what I meant to say.

Q. That is the cross-over north of the station?

A. Yes.

Q. Where the accident occurred?

A. Yes.

Q. And that cross-over came from which side of

the main tracks? Suppose you are going the way Mr. Young was going, you were going eastward on the track nearest to the Lehigh River, suppose you were going that way, from which side did the cross-over tracks come?

A. From the cement plant, the north side.

Q. Tell with your hand. Tell us which hand, your left hand or your right side?

A. To the right, the cross-over, that is, where it came out from this cement plant, this crew—

Q. Do you mean it came from Mr. Young's right, or from his left?

A. Oh, that was to his right.

Q. Which is your right hand?

A. This.

Q. Which way was Mr. Young going?

A. Mr. Young was coming south from Mauch Chunk.

Q. Coming south?

A. Yes.

Q. On which track?

A. On the southbound track.

Q. How many tracks were there between him and the river?

A. At this point?

Q. At this point, between him and the river.

A. There was one sidetrack, which they had to store cars there.

Q. What was to his left?

A. His left?

Q. Yes.

A. At this point?

Q. At that point we are talking about.

A. To his left was the northbound track.

Q. And what else? Any other tracks?

A. And the sidetracks runnings into this cement plant.

Q. Where did this cross-over come from? From the cement side or the river side?

A. From the river side.

Q. Then that is your left side.

A. Yes, sir.

Q. Not your right?

A. Yes. I could not hear that question properly.

Q. If you do not understand me, say so.

A. Yes, sir.

Q. I will try to talk still louder?

A. Yes, sir.

Q. You saw where this cross-over came over towards the track?

A. Yes, sir.

Q. Were there any indicators there?

A. No, sir, none whatever.

Q. What is an indicator?

A. An indicator is a post sitting at the back of each and every switch, at the end of each yard, and it stands there about the height of the switch, probably about four feet high.

Q. Four or five?

A. About four feet high, with a small round dial in front of it, the same as the front of that clock there.

Q. And what are those indicators for at these cross-overs?

A. As near as I can say, as I understand—

Mr. Dickson: That is objected to. This gentleman does not know.

By Mr. Koons:

Q. How long have you been in your present occupation?

A. My present occupation?

Q. Yes.

A. The 16th of January a year ago last.

Q. What were you before that?

A. I was on the New York Central & Hudson River Railroad Company, at 72d Street, New York.

Q. And in what capacity?

A. I was a boilermaker there, a boiler inspector and boilermaker.

Q. Have you had any experience as an engineer or fireman on those different roads?

A. No, sir.

Q. Then you only know that there was no indicator at this cross-over?

A. I certainly do.

MR. DICKSON: I object to that and I ask to have it stricken out.

(Question withdrawn.)

By MR. KOONS:

Q. What was there in the way of semaphores, or anything at all, where this cross-over came into the eastbound track?

A. Please state that question again.

Q. What was there where this cross-over came over to that eastbound track?

A. In regard to protection?

Q. Yes.

A. Not any that I know of.

Q. Nothing. North of this cross-over, on the eastbound track, what was there?

A. There was a semaphore.

Q. About how far above where the cross-over came into the track?

A. I should judge about twelve hundred and fifty feet, or probably half a mile.

Q. Above the cross-over?

A. Above the cross-over.

By THE COURT:

Q. Was that north or south?

A. That is north of the switch where this engine struck?

By MR. KOONS:

Q. Did you actually see that, or are you guessing?

A. I have seen it.

Q. Did you see it that day?

A. Yes, sir, and the one beyond that yet.

Q. And the one beyond that was about how far?

A. About one mile.

Q And they were along which track, which of the main tracks?

A. The southbound track coming south.

Q. The one main track nearest the river?

A. Yes, sir.

Q. And on which side of the track?

A. The right side.

Q. The right side?

A. Yes.

Q. You say the semaphores were on the right side of the track?

A. I do not understand you.

Q. I understood you to say that these two semaphores along the eastbound or southbound track were to Mr. Young's right?

A. Yes, sir.

Q. How close to the track?

A. Probably about six feet, as near as I can judge.

Q. How high are those semaphores, about?

A. From the ground?

Q. From the ground up to the top.

A. I should judge about twenty-five feet.

Q. And how far is it from the ground up to the arms of the semaphore?

A. The arms?

Q. Yes.

A. They run about twenty feet, I suppose.

Q. About twenty feet?

A. Yes, somewhere along there.

Q. Did you know Mr. Young before he met his death on this day?

A. I do not understand.

Q. Did you know Mr. Young before he met his death on this day?

A. Yes, sir.

Q. How many years?

A. About twenty-two.

Q. How shortly had you seen him before the accident?

A. Oh, it was over a year.

Cross-examination.

By Mr. Dickson:

Q. How did you measure this distance?

A. By counting the rails.

Q. By counting the rail lengths?

A. Yes, sir.

Q. How many rail lengths was it from the Siegfried station to the cross-over?

A. I do not understand.

Q. How many rail lengths from Siegfried station to the cross-over?

A. I did not take the number of rails from the station, I took the rails from about the switch. As near as I could recollect, about 198 rails.

Q. 198 rails?

A. Yes.

Q. From the cross-over to what?

A. To the first signal above the cross-over—that is, the semaphore.

Q. How many rail lengths from there to the next semaphore?

A. I do not just recollect that.

Q. You do not remember, or you did not count how many it was from the station up to the cross-over?

A. Not from the station, no, sir.

Harry Young, having been duly sworn, was examined and testified as follows.

By Mr. Koons:

Q. You are the son of Mrs. Young, wife of Peter B. Young?

A. Yes.
Q. How old are you?
A. Nineteen.
Q. And do you remember the time of this accident?
A. Yes, sir.
Q. But you did not see it?
A. No, sir.
Q. You saw your father afterwards?
A. Yes, sir.
Q. Do you know how long your father had worked for the Central Railroad of New Jersey as engineer?
A. I should judge about two years.
Q. And before that?
A. About four years.
Q. And what was his record for steadiness as a worker?
A. Good.
Q. Good?
A. Yes, sir.
Q. What was your father's condition as to health and ability to work? What was it?
A. Good.
Q. And how did he provide for your mother and the rest of you?
A. Good.
Q. What did he do with his wages?
A. Fetched them home.

(No cross-examination.)

JOHN H. BARTLETT, having been duly sworn, was examined and testified as follows:

By MR. KOONS:

Q. How old are you?
A. Forty-three.
Q. And where do you live?
A. Lansford, Carbon County.

Q. At the time of the accident, where did you live?

A. Mauch Chunk.

Q. This state?

A. Yes, sir.

Q. What is your occupation at the present time?

A. Flagman.

Q. I say at the present time what is your occupation?

A. Motorman on a trolley car.

Q. For what line?

A. Eastern Pennsylvania.

Q. And how long have you been employed in that capacity, about?

A. Since May 10, 1910.

Q. Do you remember the date of this accident to Peter B. Young?

A. Yes, sir.

Q. Where he lost his life?

A. Yes.

Q. What do you fix as that date?

A. October 9, 1909.

Q. And about what time of the day?

A. I judge about 8.05 to 810 a. m.

Q. And where?

A. At Siegfried.

Q. This state?

A. Yes, sir.

Q. Siegfried is how far north of Allentown, about?

A. I judge about eight or nine miles.

Q. And about how far is it from Mauch Chunk?

A. About twenty-two miles.

Q. About twenty-two miles?

A. Yes, sir.

Q. At the time of this accident by whom were you employed?

A. The Central Railroad of New Jersey.

Q. The defendant in this case?

A. Yes.

Q. And as what? What was your occupation?

A. Flagman.

Q. And on what train were you?

A. I was on an extra, an extra stock train that morning.

Q. Who was the engineer of that train?

A. Peter B. Young.

Q. The man whom we are speaking about who was killed?

A. Yes, sir.

Q. Where did you get this train?

A. We were called at eleven o'clock Friday night for one o'clock, to leave, to go to Haucks.

Q. Where is Haucks?

A. Haucks is about twelve or fifteen miles above Mauch Chunk.

Q. What time did you leave Haucks?

A. We had an accident on account of the train brakeman throwing the cars off the track, and we did not leave there until about around six o'clock, as near as I can tell you.

Q. Of the morning of this day?

A. Yes.

Q. There was nobody hurt in that accident?

A. No.

Q. That is not confused with this?

A. No, sir.

Q. About what time was it when you left Mauch Chunk?

A. We left there after No. 8. We laid at the Mauch Chunk bridge until that passenger train left, 7.15.

Q. In the morning?

A. Yes.

Q. Of October 9?

A. A. M., yes, sir.

Q. And then you proceeded down the Lehigh River?

A. Yes, sir.

Q. And you came to Siegfried about when?

Mr. Dickson: He has already said about 8.05 or 8.10.

By Mr. Koons:

Q. There is a yard at Siegfried, is there not?

A. Yes, sir.

Q. Is that north of the station or south of the station?

A. We call it west.

Q. You call it west?

A. Yes.

Q. By that you mean between Siegfried and Mauch Chunk?

A. Yes. According as you mean it, it is north.

Q. And which track were you proceeding on?

A. The eastbound track.

Q. And that one is on which side, comparing it with the river, the river side or on the cement side?

A. The river side.

Q. And what was between that track and the river?

A. Nothing right there, where we struck.

Q. But—

A. But down below there, a mile—

Q. There is a siding?

A. Yes, sir, a storage track.

Q. Then towards your left was the westbound main track?

A. Yes.

The Court: Confine it to the other designation of north and south, if you can.

Mr. Dickson: I think your Honor will find that the railroad men will say east and westbound.

By Mr. Dickson:

Q. Is not that so?

The Court: The northbound is the west side?

MR. DICKSON: Yes.

THE COURT: And the southbound is the east?

MR. DICKSON: Yes.

By MR. DICKSON:

Q. All railroad men speak of it as being east and westbound, do they not?

A. Yes. That is what you are governed by in the Central Railroad of New Jersey. In the Philadelphia & Reading it is north and south.

By THE COURT:

Q. What track was this you were on?

A. Eastbound.

By MR. KOONS:

Q. Between the westbound and the cement works were a number of tracks?

A. Yes.

Q. How long is this yard, about?

A. I judge about three-quarters of a mile long.

Q. And as you come into it from the upper end, what meets your eyes coming along the track?

A. There is a block there.

Q. And by "block" you mean what?

A. The block signal that you run on.

Q. That block signal—

A. That governs your running.

Q. That governs your running. Just what is that block signal? Tell us what it is.

A. In case it is red, you are supposed to stop.

Q. What is it? Is it a house or a barn or a pole, or what is it?

A. It is a pole with a green and red signal on it.

Q. What other kind of signals are there on it?

A. Green and red and white.

Q. Another name for that block signal is semaphore, is it not?

A. Yes.

Q. On which side of this eastbound track is this semaphore, as you come into the yard?

A. On the right-hand side.

Q. The right-hand side?

A. Yes.

Q. How close to the track?

A. I judge about eight or ten feet, in some places, just according to what room they have to put them.

Q. And how high are the arms of that semaphore above the engineer sitting in his cab?

A. I judge about twelve feet.

Q. When he is sitting in the cab the arms are about twelve feet above his head?

A. Yes.

Q. Now as you proceed along this track eastward, what next do you come to?

A. The next is the station.

Q. Is there anything before you come to the cross-over?

A. The one where they had the accident?

Q. Just before you come to that.

A. We struck at this cross-over—

Q. Before you come to the cross-over, how many semaphores are there between the first one that you just described and this crossing?

A. There are two. They are about a mile apart, or a mile and a quarter, just according to the way the curves are, the elevations of the road.

Q. Then I understand that from the first semaphore that you meet, as you come into the yard, down to the second semaphore, is about a mile?

A. Yes, sir.

Q. That second semaphore, how close is it to the eastbound track?

A. That is the same distance.

Q. The same as the other one?

A. Yes.

Q. The same height?

A. Yes.

Q. And the arms are about the same distance above the engineer's head sitting in the cab?

A. Yes.

Q. And how far above the cross-over is that second semaphore? I mean the cross-over where the accident occurred.

A. As near as I can judge, it is about two or three hundred feet, anyhow.

Q. Two or three hundred feet?

A. Yes, sir.

Q. How long had you been employed by the company as flagman?

A. I could not just exactly say. About eight or nine months.

Q. What was your run? Over what part of the road?

A. Eport; from Mauch Chunk to Eport.

Q. Did that take you past through this yard?

A. Yes.

Q. Then you have been going back and forth through this yard for nine months?

A. Yes, sir.

Q. At the place where this cross-over comes into this eastbound track, meaning the cross-over where the collision occurred, what is there?

(Objected to.)

(Question withdrawn.)

By Mr. Koons:

Q. Where were you at the time of the accident?

A. In the caboose.

Q. In the caboose of the train that Mr. Young was operating?

A. Yes, sir.

Q. And who was with you in the caboose?

A. The conductor, Mr. Carrigan.

Q. Mr. Carrigan?

A. Yes, sir.

THE COURT: Did the witness fix the distance the first semaphore was above the crossing, the cement crossing?

MR. KOONS: I believe he said the first semaphore was over a mile above the station. I believe he fixed that.

THE WITNESS: Yes.

By MR. KOONS:

Q. How far is the crossing—I do not mean the cross-over, but the public highway crossing below the station at Siegfried, where they travel over in teams?

A. About twenty yards.

Q. About twenty yards?

A. Yes.

THE COURT: I want the distance from the cement switch up to this semaphore.

MR. KOONS: The semaphore he saw when he came into the yard.

By MR. KOONS:

Q. The first semaphore you saw as you came into the yard is about a mile above this cross-over. Is that correct?

A. No, it is not a mile above.

Q. How far is it above that cross-over where the accident occurred?

A. I did not measure that.

Q. About?

A. I could not say.

Q. About?

A. About two or three hundred feet.

Q. No, we mean the first semaphore as you come into the yard.

A. Where the cross-over was where this happened?

Q. Above the cross-over. I understand there were two semaphores, one as you come into the yard and

then another one down near the cross-over. I want to know how far the first semaphore was—

A. There is one very near at the station, and the other one is about two or three hundred feet above the cross-over where it happened.

Q. One semaphore is about three hundred feet above the cross-over. Is not that true?

A. Yes.

Q. How far above that is the other semaphore, the first one?

A. Going east?

Q. No, the one on your track?

A. About a mile.

Q. Then there is a mile distance between the two semaphores?

A. Yes.

Q. It is about three hundred feet more from the second semaphore to the cross-over?

A. Yes.

Q. What kind of a train was this? That is, how many cars were there beside the engine?

A. Twenty-seven, as near as I know.

Q. Twenty-seven?

A. Yes.

Q. Are you counting the caboose with that?

A. No, sir.

Q. What were those cars loaded with?

A. Seventeen of stock and ten of coal, soft coal.

Q. All loaded?

A. Yes.

Q. Where were you going with this train?

A. Jersey City.

Q. And that is in the state of New Jersey?

A. Yes, sir.

Q. The Central Railroad of New Jersey is a road that runs from Scranton, Pennsylvania, to Jersey City, New Jersey?

A. Yes.

Q. It runs through two states?

A. Yes.

Q. Pennsylvania and New Jersey?

A. Yes, sir.

Q. As you come to the upper end of this yard at Siegfried, how fast were you going, about?

A. About seventeen or eighteen miles an hour.

Q. How fast were you going as you went through the yard; that is, between the two semaphores and up to the cross-over?

A. He shut off after he left Trackler station above, after he got around the curve.

Q. That is at the first semaphore?

A. Yes.

Q. He shut off the steam?

A. Yes.

Q. And from there down to the accident, how fast was he going, about?

A. We were drifting in about seventeen or eighteen miles an hour.

Q. Was that rate beyond that fixed under the rules of the company?

(Objected to.)

(Question withdrawn.)

By Mr. Koons:

Q. How does that speed compare as provided by the rules of the company?

Mr. Dickson: That is objected to. If he is going to refer to the rules of the company we must have the rules you refer to.

The Witness: That is the caution.

Mr. Dickson: He is asking about the rules of the company. They are printed. They are here. I am perfectly willing to furnish them.

The Court: I do not see the necessity for counsel for plaintiff presenting this question just

now, because we have not got to a place where we can properly rule on it.

Mr. Dickson: If I raise the question that he was going too fast, that would be their rebuttal.

The Court: That is the defence. You are anticipating.

(Question withdrawn.)

By Mr. Koons:

Q. You were going through this yard, you say, about eighteen miles an hour at the time the collison occurred?

A. Yes.

Q. When the collision occurred, where were you?

A. In the caboose.

Q. What was the first intimation you had of it?

A. It was the least little bit of a jar.

Q. And what did you do?

A. What I did was to look out ahead, but you could not see only about four car lengths.

Q. Why not?

A. It was that foggy.

Q. It was a foggy morning?

A. Yes.

Q. But you could see about four car lengths?

A. Three or four car lengths, yes, sir, it was that heavy.

Q. Tell us what you did or what you saw.

A. We did not do anything, only brace ourselves, you know, thinking that they were broken loose or something. This bump was whenever he struck the engine. Then they proceeded a mile beyond. We could not imagine what was wrong. So of course, I had to protect my train and I went back.

Q. Then you had felt this bump of the cars?

A. Yes, sir.

Q. And the train went another mile before you stopped?

A. Yes, sir.

Q. And then you got out to protect the rear end of your train?

A. Yes, sir.

Q. That is, you went to protect the track and to put out the usual signals, to prevent a train, or another train, running into your rear?

A. Yes.

Q. And after you did that what did you do?

A. I noticed the coal and the hooks off the small engine, around the track, and I saw this man Moyer lying there with his skull fractured.

Q. That was how far below Siegfried station where you saw that?

A. This was above, where we first struck, right below the crossing.

Q. Just tell us where you saw this engineer of the shifting engine?

A. Right below the cross-over, just as they had crossed over they struck.

Q. And how far below the cross-over?

A. About three or four rail lengths.

Q. And you saw the coal and different things scattered?

A. Yes, the hooks, the scrapers, and everything else off the small engine, off the tank.

Q. But you did not see the engines there?

A. No, sir.

Q. Where did you see the engines?

A. After I flagged 60 freight I walked down and I told McGinley, the engineer of 60 freight, not to cover that crossing, because he had to move back—

Mr. Dickson: I object to the conversation.

By Mr. Koons:

Q. You went down to the place where you saw the engines?

A. Yes, sir; I told him not to cover that.

Q. We do not care about that.

THE COURT: You must not tell any conversation you had.

By MR. KOONS:

Q. How far below Siegfried station was it that you found the two engines, about?

A. About fifty yards.

Q. Below Siegfried Station?

A. Yes, sir.

Q. Where were the engines?

THE COURT: How far would that be below the crossing?

By MR. KOONS:

Q. How far was it below the cross-over, when they first came together?

A. About a mile, I judge.

Q. About a mile?

A. Yes.

Q. Where did you find the two engines?

A. They were about fifty yards below the station.

Q. On the track or where?

A. One was on the track. The small engine was on the track and the No. 184 was off the track.

Q. By "184" you mean Mr. Young's engine?

A. Yes.

Q. 184 was off the track?

A. Yes.

Q. Was it toppled over?

(Objected to.)

(Question withdrawn.)

By MR. KOONS:

Q. It was off the track, anyhow?

A. Yes.

Q. In what position? What was its condition?

A. She was close to the rails. The tank and her were close, as I could judge—

Q. I want to know the condition of the engine,

whether it was in the same condition it was before the accident?

A. It was broken up a little bit.

Q. Which way? Was she standing up or lying down?

A. No, she was standing up.

Q. Where was it you found Mr. Young?

A. I did not know where he was yet. The cars were on top of him. He was rolled up under the stock cars, in the cinders.

Q. You helped take him out, I believe?

A. Yes, sir.

Q. You found his body underneath these cars?

A. Yes.

Q. And he was dead?

A. Yes.

Q. And those cars were lying behind his engine?

A. Yes, on the side, the right-hand side of the track.

Q. What kind of an engine was his, as to size? I mean Mr. Young's engine?

A. It was about the same as some of them on the passenger service.

Q. Full size?

A. A six-wheel connecter—

Q. A freight engine?

A. Or a three-wheel connecter.

Q. What kind of an engine was it that came out from the cross-over?

A. It was a small one, as we usually call a gunboat engine.

Q. Much smaller than the other engine?

A. Yes, sir.

Q. Lighter?

A. Yes, sir.

Q. What warning did any of the crew on that train have of this engine or train that had come out on that track from the cross-over?

MR. DICKSON: That is objected to. This man was in the caboose.

By MR. KOONS:

Q. Do you know?

A. They did not have any warning at all.

Q. So far as you know there was no warning?

A. Yes, sir; no warning at all.

Q. Which train had the right of way on this eastbound track, your train or the other one?

A. We were supposed to have the right of way.

Q. What was the duty of this shifting crew when they came out on your track?

MR. DICKSON: That is objected to.

THE COURT: You are getting into the defence.

MR. DICKSON: I think really we are getting into a question of rules.

THE COURT: The question of the right of way of either of these trains would depend either upon the rules or upon special orders.

MR. KOONS: He said this train had the right of way over that one that came out of the crossover.

MR. DICKSON: Then I would like to have that statement stricken out. I do not think it is the best evidence.

THE COURT: It does not do you any good to strike it out. The jury hears it. It is on the record. You might as well let it be there.

MR. DICKSON: I think I can show to you that it is not the fact.

By MR. KOONS:

Q. Which was the superior train, Mr. Young's train, or the shifting crew?

A. Mr. Young's train.

MR. DICKSON: That is objected to.

(Objection sustained.)

(Question withdrawn.)

By MR. KOONS:

Q. How long had you known Mr. Young prior to this accident?

A. About two years.

Q. Do you know whether the Central Railroad of New Jersey at the time of this accident had any retiring age for its engineers?

A. Not that I know of. I never heard of it.

Q. How long can engineers remain in the employ of the company?

A. As long as he is fit for service.

Q. They have no definite time as to which they remove him?

A. No, sir.

Q. How about the brakes of any kind on your train after you first felt this bump?

A. We have a gauge in the caboose, but we did not see the air used.

Q. You did not see the air used?

A. No, sir, without he used the driver brake.

THE COURT: I understand the train was equipped with air brakes?

MR. KOONS: Yes, but it is important to show why these trains went so far after they collided. Of course, they went quite a distance after they collided.

THE COURT: We have the fact that they went quite a distance after they collided. I do not think the burden is on you to show why they went.

By MR. KOONS:

Q. What was the grade at this place, on the up or down, the way you were going?

A. It was very little down grade. Of course the train would drift.

Cross-examination.

By Mr. Dickson:

Q. How long is a car length?

A. There are some thirty-six and there are some thirty-eight.

Q. When you speak of three or four car lengths you mean that you take about thirty-five to forty feet as being the car length, do you?

A. What is that?

Q. When you speak of the distance as being so many car lengths what do you mean? What figure do you have in mind for the length of a car?

A. About two cars will take up the length of two rails.

Q. Two cars will take up the length of two rails?

A. Yes, sir, something like that.

Q. About how long is a rail, then?

A. Thirty feet.

Q. So that when you refer to a car length, to use it as a measure of distance, you mean about thirty feet. Is that it?

A. Yes.

Q. And when you said a little while ago that you saw that morning about three or four car lengths, you meant from about ninety to one hundred and twenty feet?

A. Somewhere around there, yes, sir.

Q. The reason you could not see farther was because it was a foggy day?

A. Foggy, yes, sir, very heavy.

Q. You were coming down along the river where the mist lies in the morning?

A. Yes, sir.

Q. Where is the yard limit board?

A. Right east of that cross-over switch—or west of the cross-over switch.

Q. West of the cross-over?

A. Yes, sir.

Q. How far west of the cross-over?

A. I could not tell you the exact distance.

THE COURT: West of the cross-over is below the cross-over?

MR. DICKSON: No, west or north of the cross-over.

By MR. DICKSON:

Q. It is a fact, is it not, that you come to the yard limit board before you come to this semaphore you spoke of?

A. Yes, sir.

Q. So that the semaphore or block signal is inside of the yard limits?

A. Yes, sir.

Q. And this semaphore that is within the yard limits you speak of is one of the regular semaphores that you see all along the line of road, is it not?

A. Yes, sir.

Q. And the average distance between those is about a mile, is it not?

A. Yes, sir.

Q. And the next semaphore below the one just inside the yard limits is about a mile below?

A. Yes, sir.

Q. And the same distance is kept up right through the yard?

A. Yes, sir.

Q. You were mistaken, were you not, when you said there was a semaphore only two or three hundred feet away from this cross-over?

A. Of course, I could not rightly tell the distance, but I know there is one above it, a short ways.

Q. West of that?

A. Above the cross-over.

Q. West of it, you mean?

A. Yes.

Q. Are not you thinking of the one that is a short distance below it?

A. No, sir.

Q. You are not thinking of the one just inside of the yard limits, three thousand feet away, are you?

A. Above the cross-over where we first hit?

Q. Yes.

A. I could not tell you the distance above it, but I know there is one there.

Q. Then you are not very sure on the distances, are you?

A. No, sir.

Q. You have just measured the distances with your eye as you have walked through the yard?

A. Yes, sir.

Q. This engine was off the rails, but was standing up, as I understand it, after the accident?

A. Yes, sir.

Q. You did not count the cars that morning, did you?

A. No, sir.

Q. If you were told that there were thirty-seven cars instead of twenty-seven you would not be surprised, would you?

A. I cannot say. Somewhere in that neighborhood. Either twenty-seven or thirty-seven. I could not rightly tell.

Q. The conductor ought to know that, ought he not?

A. The conductor knows that. That was not my place.

Q. You spoke of there being a slight jar or a bump when the engine of your train was running into this other engine, and then the train went on with this little engine being pushed ahead of it, and then when you came to a stop, what sort of a stop was there?

A. It was no bump or jar or anything.

Q. It came to a quiet stop, too, did it?

A. Yes, sir, very easy.

Q. At the time this train came on along this track

before you ran into the little engine, you were in the caboose, were you not?

A. Yes, sir.

Q. Sitting there talking with the conductor?

A. Yes.

Q. You were not looking out?

A. I was looking out of the window.

Q. Looking out to the rear?

A. Looking ahead.

Q. You could not see ahead, could you?

A. As far as we could see, yes.

Q. You could only see three or four car lengths ahead? You could not see directly ahead because the rest of the train was in front of your caboose, was it not?

A. We had soft coal cars ahead of us.

Q. Soft coal?

A. Yes.

Q. And there were some cars of soft coal first, then came the stock cars?

A. The stock cars were on ahead, in front.

Q. Those stock cars are those big square cars, are they not?

A. They were on the head end of the train.

Q. So that you do not know what Mr. Young up on that engine could have seen, do you?

A. No, sir.

Edward Decker, having been duly sworn, was examined and testified as follows:

By Mr. Koons:

Q. How old are you?

A. Twenty-five.

Q. Where do you live?

A. Mauch Chunk.

Q. What is your occupation at the present time?

A. Fireman.

Q. With what company?

A. The Central Railroad of New Jersey.

Q. The defendant company here?

A. Yes, sir.

Q. On the day of this accident what was your occupation?

A. Fireman.

Q. Where were you at the time of the accident?

A. In the tank of the engine.

Q. With whom?

A. I was in there by myself.

Q. Where was Mr. Young?

A. In the cab.

Q. You were right back of him, you say, in the tank?

A. Yes, sir.

Q. Where did this accident happen? Near what place?

A. Siegfried.

Q. About how far above the station?

A. I could not just tell you. About a quarter of a mile, maybe, somewhere around there.

Q. Describe more fully at what place along this track?

A. At the cross-over switch west of Siegfried station.

Q. At the cross-over switch?

A. Yes.

Q. About a quarter of a mile north of Siegfried?

A. Yes, somewhere around that neighborhood, or more, I could not just tell.

Q. You were coming eastward on the eastbound track?

A. Yes, sir.

Q. On the freight train?

A. Yes.

Q. Do you know how many cars were on that freight train?

A. I think thirty-six at the time.
Q. What did they contain?
A. Seventeen of stock and nineteen of coal, I think.
Q. And the caboose?
A. Yes, sir.

By The Court:

Q. How many cars?
A. Thirty-six.
Q. Thirty-six and the caboose?
A. Yes.

By Mr. Koons:

Q. How far is the upper end of this yard at Siegfried from the cross-over?

A. It is quite a distance. It is up to the curve anyhow.

Q. A mile or so?

A. I could not just say whether it was a mile, you know. I just don't know exactly the distance, but it is quite a distance. It must be somewhere in the neighborhood of a mile.

Q. You think it is about a mile?

A. Somewhere around there.

Q. As you come into the yard what do you observe along this eastbound track?

A. What do we observe?

Q. Yes, any signal boards, or anything of that kind?

A. Yes, there is one somewhere outside of the yard limits there above, and as you get around to the curve, inside the yard limits, there is another board there.

Q. Are both of those semaphores on the right side of the track?

A. Yes.

Q. About six feet from the track?

A. Somewhere around that.

Q. And they are about twenty feet above the ground?

A. I suppose that, yes.

Q. How far are the arms above the engineer sitting in his cab?

A. Oh, they may be seven, eight or nine feet, somewhere around there. I could not just tell, when he was sitting down.

Q. Where was Mr. Young at the time of the collision?

A. At the time of the collision—you mean when we first struck?

Q. Yes, when you first struck.

A. I guess he was in the cab. I suppose he was in the cab when they first struck.

Q. You know, don't you?

A. I was not watching him when they hit.

Q. He was on the engine, was he not?

A. Yes.

Q. You know that?

A. Yes.

Q. Then where did the first collision occur?

A. Right at the cross-over switches.

Q. This first semaphore you came to, how were its arms? What were the colors of its arms shown to you?

A. They were clear.

Q. By that you mean white?

A. Yes.

Q. When you came to the next semaphore, what did they show?

A. They showed clear, too.

Q. And by "clear" you mean what color?

A. White.

Q. And that second semaphore is above the cross-over?

A. Yes.

Q. About how far?

A. Oh, I suppose about half a mile. It is quite a distance, anyhow.

Q. And at what rate of speed were you going through the yard at the time of the collision?

A. About eighteen or twenty miles an hour.

Q. You were taking this train to Jersey Cit believe?

A. Yes.

Q. From Haucks?

A. Yes.

Q. Just tell us what you saw and what happe as you struck this other engine at the cross-over?

A. I saw them first at the cross-over when we it. I first saw somebody waiving a little handkerc The first bump we struck at the cross-over switc I saw two men standing there. This engine was a to cross. One of the fellows waived his little red h kerchief, or something like that, before we hit t and just about that time we struck the left hand of the engine.

Q. Somebody waived a handkerchief just a the time you struck?

A. Yes.

Q. Who is that somebody? Where was he st ing?

A. I did not recognize him, just exactly wh was. I suppose one of the brakemen off the Sieg crew—off the crew.

Q. You do not know who it was, though, do

A. No, I did not just at that time.

Q. What warning, if any, was given to the of the presence of this shifting train on your t

Mr. Dickson: That is objected to. This says he was in the tank.

Mr. Koons: He can tell what he knows

Mr. Dickson: I do not see how he can anything about it.

The Court: He can tell what he knows

By Mr. Koons:

Q. Do not tell what anybody else told you what you saw.

A. What I saw myself, certainly.

Q. Which way were you facing just before the collision occurred?

A. Which way was I facing?

Q. Yes.

A. Looking ahead.

Q. You were looking ahead?

A. I was looking ahead.

Q. Did you see the track ahead of you?

A. I was watching it, you know.

Q. You were watching it, and how far ahead of the engine could you see, about?

A. About eighty or ninety feet, something like that.

Q. Eighty or ninety feet?

A. Yes.

Q. Did you see anybody between the cross-over and your engine after you passed the second semaphore?

A. No, sir.

Q. Did you see anybody, any flagman, out there?

A. No, sir, no flagman out there.

Q. No flagman there?

A. No.

Q. Then, so far as you saw, was there any warning given to you of the existence of this other train on your track?

A. No, not until we got right on to him.

Q. Not until you were right on to him?

A. No.

Q. Just tell us what Mr. Young did and what you did just at the time the collision came.

A. I could not tell you what Mr. Young did. I was on the opposite side of the train from where Mr. Young was.

Q. What did you do? What happened to you?

A. I stayed right there in the tank. I stayed in the tank of the engine.

Q. You stayed in the tank of the engine, and what did the shock do to you?

A. It did not do much to me.

Q. You don't know what became of Mr. Young?

A. No, sir, not at the time.

Q. Then this was what kind of a collision—a side or a head on?

A. Just a head on.

Q. Just a head on?

A. Yes.

Q. That is, your engine went right straight into the other one?

A. Yes, sir.

Q. Which way was the other engine pointing, toward you or away from you?

A. Towards us, westward.

Q. Pointing toward you?

A. Yes.

Q. Had it come out fully on your track?

A. Just about reached fully on the track.

Q. Just about in the track?

A. Yes.

Q. Which was the larger engine?

A. Our engine.

Q. And how much larger?

A. Oh, I judge about half as big again, something like that. I could not just tell.

Q. That is near enough. You say half again as big. This was a small shifting engine, the one that was coming at the cross-over?

A. A small engine, yes.

Q. Did it have any cars to it?

A. No, sir.

Q. What became of the engineer of the shifting engine when you struck?

A. I don't know what became of him.

Q. Did you see him afterwards?

A. No, I did not see him afterwards.

Q. His body, I mean.

A. I saw his body laid down at the station afterwards. That is all I know.

Q. Do you know what anybody on the crew did to the shifting engine as you struck, or shortly after?

A. Did to the shifting engine?

Q. Yes. Was she under steam when you struck?

A. I could not tell you.

Q. Was she stationary when you struck?

A. She was moving?

Q. Moving?

A. Yes.

Q. Toward you or away from you?

A. Away from us.

Q. Moving away from you?

A. Yes.

Q. And then you ran into her in that position?

A. Yes.

Q. Do you know how rapidly she was moving away from you?

A. I could not just tell you how rapidly.

Q. Was she moving as rapidly as your train?

A. No, not as rapidly as ours.

Q. There could not have been any collision if she was, but you do not know how fast that train was moving?

A. No, I could not tell you.

Q. You only knew she was moving there when the collision occurred?

A. Yes.

Q. You don't know what became of Young after this first collision?

A. No, sir.

Q. When did you next see him, either alive or dead, after the collision?

A. When did I next see him? I saw him dead the next time I saw him.

Q. Where? How far below the station?

A. I did not see him until they fetched him up to the station.

Q. Where were you all this time?

A. I was knocking the fire out of the engine, out of our engine.

Q. You were firing the engine?

A. I was knocking the fire out.

Q. Did you put on any brake on your engine, on your train?

A. Who do you mean?

Q. You.

A. No, sir, I did not.

Q. Did you put on any emergency brake of any kind?

A. No, sir, I did not.

Q. Why did not you do those things?

A. Because I did not have anything to put them on with.

By The Court:

Q. You were on the other side of the engine?

A. Yes.

By Mr. Koons:

Q. There is no emergency brake on this engine?

A. No, not at that time, not that I knew of, anyhow.

Q. In other words, there is a brake for the engineer to use?

A. Yes.

Q. Then there is an emergency brake on your side in cases of this kind?

A. I was back in the tank, in the tank, not in the cab of the engine.

Q. The tank is in back of it?

A. No, the cab sits quite a distance from the tank.

Q. The tank is right back of the fire box of the engine?

A. Yes, sir.

Cross-examination.

By Mr. Dickson:

Q. Was this engine one of the kind that has a cab far forward along the side of the boiler?

A. You mean 184?

Q. Yes.

A. Yes, sir, it just sits right ahead of the fire box of the engine.

Q. I think the jury want to understand the construction, in a general way, of this engine. Describe how the engine is put up? What is the front part of the engine, the boiler, or what comes front?

A. In front of the engine is the boiler, and the cab sits just about half way of the length of the boiler, you know—half way from the front end to the back end, somewhere around there.

Q. Then between the cab and the back end of the boiler, what is there?

A. That is what they call the fire box that is there. It is back of the tank.

Q. I want to get, first of all, so that the gentlemen will understand, where this cab is.

A. It is about in the middle of the boiler of the engine.

Q. The cab is about in the middle of the boiler?

A. Yes.

Q. And do you know how long that boiler is?

A. I could not just tell you.

Q. About how long?

A. It is about twenty-five feet.

Q. About twenty-five feet long?

A. Yes. I could not tell exactly.

Q. Back of the boiler you have the fire?

A. The fire box, yes.

Q. How long is that?

A. About ten or eleven feet, I guess.

Q. And then back of that fire place is the place you call the tank, is it?

A. Yes.

Q. So that when you are working at the fire and you are in the tank, are you actually standing on the locomotive or are you standing on the tender?

A. Standing in the tank of the engine.

Q. What is the tender? Is the tender the same as the tank?

A. Yes, sir.

Q. When you were back in the tank you mean you were back on the tender, and that is attached to the engine?

A. Yes.

Q. Working at the fire box of the engine?

A. Yes.

Q. And that fire box is in front of you?

A. Yes.

Q. Is there any hood over the fire box there?

A. Yes.

Q. There is a hood over that?

A. Yes.

Q. You mean a covering, where you work?

A. Yes, it reaches about a couple of feet.

Q. From the front wall of the fire box?

A. Yes, from the back wall of the fire box.

Q. The one that is nearest to you?

A. Yes.

Q. Then how do you get from this place where you work into the tank? How do you get to the cab?

A. On a running-board.

Q. That running-board runs along the sides of the boiler, does it?

A. The sides of the boiler, yes.

Q. If you are on the engineer's side you go along the right side—the right-hand running-board?

A. Yes, sir.

Q. And if you want to go to the fireman's side you go on the other side?

A. Yes, the left running-board.

Q. When you are on that running-board, the left-hand running-board, what is there between you and the other running board, between you and the right-hand running-board?

A. The boiler.

Q. And how high does that boiler rise above the level of where you are walking, if it does rise?

A. I guess about six feet, somewhere around there.

Q. When you are walking along one running-board could you see a man who is on the other running-board?

A. No, sir.

Q. You cannot see him?

A. No, sir.

Q. The boiler is too high between you to enable you to see him?

A. Yes.

Q. When you are in this tank, or in this tender, at the back end of that cover that covers the fire box there, can you see the man who is in the cab on either side?

A. What do you mean?

Q. When you are in the tank, doing work there?

A. Directly on the left side, I could see a man on the left side of the cab.

Q. You could see a man on the left side of the cab?

A. Yes.

Q. If you are over on the left side of the tank you can see along the running-board if the man is on the left side of the tank?

A. Yes, if I am on the left side I could see along the one side.

Q. But you have to move from one side to the other in order to see along the side of the boiler?

A. Yes.

Q. Then, when you were back in this tank where was Young?

A. I guess he was on the right side of the cab.

Q. He was on the right side of the cab?

A. Yes.

Q. And he was then about how many feet away from you?

A. He must have been about fourteen feet away from me.

Q. About fifteen feet away from you? You could see him by going up to the right side of the cab?

A. Yes.

Q. And looking along?

A. Yes.

Q. When you said you saw this semaphore, as you came in, just after you entered the yard—one before you entered the yard and one after you entered the yard—was clear, where were you at the time?

A. On the right-hand side.

Q. On the right-hand side?

A. Yes.

Q. And after you had passed the second semaphore, which is the one inside the yard, where did you go then?

A. Stepped across to the left side.

Q. So that when you stepped on the left side, were you then able to see the engineer in the cab?

A. No, sir.

Q. You could not see him?

A. No, sir, I could not see him.

Q. And where you sat did you have a lookout ahead?

A. Yes, sir.

Q. And it is that lookout ahead that you say you had of eighty or ninety feet, through the fog, as you went forward?

A. Yes.

Q. You say just before the engine struck you saw somebody waving a flag?

A. Yes, sir.

Mr. Koons: He did not say waving a flag. He said waving a handkerchief.

A. Yes, sir.

By Mr. Dickson:

Q. Waving a handkerchief?

A. A handkerchief, I guess it was. I could not tell.

Q. It was a red handkerchief?

A. I think it was red.

Q. And where were you then? Were you still in the tank at the time the collision took place?

A. Yes, sir.

Q. And you remained there?

A. Yes, sir.

Q. And you say you started to take out the fire?

A. That was after we stopped.

Q. After you stopped?

A. Yes.

Q. You struck something, and what was the effect upon you? You say when you struck this engine it shook you up a little bit?

A. It did not shake me any.

Q. It did not shake you up?

A. No, a little jar was all.

Q. The engine just continued running forward after that?

A. It kept running right on forward until down below the crossing.

Q. Was your engine parted in any way from the rest of the train at that time?

A. No, sir, not from the rest of our train.

Q. You went straight ahead?

A. Yes, sir.

Q. Was the train going in the same position you had been in before?

A. Yes, sir.

Q. And did you see where this little engine was then?

A. Right ahead of our engine.

Q. Ahead of yours, being pushed backward?

A. Yes.

Q. In other words, the two engines were ahead, and this engine was being backed along the track, ahead of your engine?

A. Yes.

Q. Did the air hose burst at that time, do you know?

A. No, sir.

Q. How can you tell whether it did or not?

A. On an immediate application of the air brakes, the hose bursts.

Q. As soon as the air hose bursts, the brakes go on themselves, do they?

A. Yes, sir, they go on immediately.

Q. Were the brakes put on by Young?

A. I don't think so.

Q. Your engine went on, continued on?

A. Continued on, yes, sir.

Q. And you finally came to a stop?

A. Yes, sir.

Q. Did you feel it go off the track?

A. Our engine?

Q. Yes.

A. Yes, sir.

Q. It went off the track, and it ran along on the ties, did it, for a while?

A. Yes, a short distance.

Q. And then came to a stop?

A. Yes, it stopped.

Q. Where was Young while this was going on? Do you know?

A. I don't know where he was?

Q. You don't know?

A. No.

Q. Do you know how far your engine ran after it struck this small engine, and before you came to a final stop?

A. It ran from the cross-over switches, to about,

I guess, fifty feet below that highway crossing at Siegfried.

Q. Was the distance from the cross-over switch down to below the crossing a distance of fifty feet?

A. I think it was about fifty yards. I meant to say fifty yards it was below the crossing, the highway crossing.

Q. And the highway crossing is below the railroad station, is it?

A. Right below the railroad station.

Q. And that distance—you do not know the distance from the cross-over switch to the highway crossing?

A. No, I could not just tell you the distance, you know.

Q. Was there time enough to have stopped the train—

MR. KOONS: That is objected to.

By MR. DICKSON:

Q. You say you have been a fireman. Have you had anything to do with running locomotives?

A. Have I had anything to do with running locomotives?

Q. Yes.

A. No, sir, I never handled a locomotive. I never had any running to do yet.

Q. You do not have any running?

A. No, sir.

Q. I thought you knew something about that. How long had you been a fireman before this happened?

A. Very near two years.

Q. During that time had the engineer applied the brakes to stop the train?

A. Applied the brakes to stop the train in that distance, you mean?

Q. During those two years?

A. You mean did he apply the brakes?

Q. No. Did you ever see the engineer put on the brakes to stop the train?

A. Yes, certainly, often.

Q. Did you know in about what distance he could stop a train of that size?

A. That size?

Q. Of thirty-seven cars or thirty-six cars?

A. He ought to have been able to stop it anyhow in a train length.

Q. He ought to have been able to have stopped it in a train length?

A. That is, according to his train that he had that day.

Q. I think you said that you left Mauch Chunk that morning, and you had run from Mauch Chunk down to Siegfried, had you not?

A. Yes, sir.

Q. On your trip from Mauch Chunk to Siegfried, did you stop?

A. At Perryville.

Q. You stopped at Perryville?

A. Yes.

Q. How long did you stop at Perryville?

A. I did not time myself.

Q. You did not time it?

A. No.

Q. And your idea of the speed this train was going was eighteen or twenty miles an hour as it came through the yard?

A. Yes, sir.

Q. When, if at all, did the engineer shut off his steam?

A. Somewhere right inside the yard limit board.

Q. Just inside the yard limit board?

A. Yes.

Q. And the engine ran on through the yard at eighteen or twenty miles an hour?

A. Yes, sir.

Q. How long do you say a car is?

A. A car is about forty feet, some of them are, and some of them are thirty-six.

Q. You had thirty-six cars and a caboose on this train?

A. With a sudden application, they ought to stop in twenty-five or thirty car lengths anyhow, and maybe less.

Q. He ought to have been able to have stopped in the length of twenty-five or thirty cars?

A. Yes.

Q. Could he have stopped in the length of three or four cars?

A. No, sir, not at the rate of speed he was going.

Q. He could not do that?

A. No, sir.

Re-direct-examination.

By Mr. Koons:

Q. You say at the time of the collision Mr. Young was seated on the right hand side of the cab?

A. Yes, sir, he was on the right-hand side.

Q. At his usual place?

A. That is his place.

Q. How much space has he where he sits in there, and where he was sitting on this day?

A. You mean between the outside of the cab and the boiler?

Q. The boiler is on one side, is it not?

A. Yes.

Q. And the frame work of the cab is on the other side?

A. Yes.

Q. How much space is there between the boiler—between the boiler and the frame work of the cab, the outside?

A. I guess in that class of engine about that wide (indicating).

Q. About two feet, would you call it, or two and a half?

A. About twenty-one or twenty-two inches.

Q. That is all the space he has to sit in there?

A. Yes, sir.

Q. You did not see what effect the collision had on him?

A. No, sir.

Q. Which side of the train ahead of you was it you saw this thing of waving the handkerchief?

A. The left-hand side.

Q. That is, on your side?

A. Yes.

Q. Whether or not Mr. Young saw it you do not know?

A. I do not know.

Q. Whether he could see it or not you do not know?

A. I do not know either.

Q. You could not tell, and you are not sure as to its color, are you?

A. It was red anyhow, whatever it was.

Q. Whatever it was, you say it was red?

A. Yes, whatever it was, it was red.

Q. And how near were you to this person who was waving this?

A. Two or three car lengths, about, I guess.

Q. Two or three car lengths?

A. Yes.

Re-cross-examination.

By Mr. Dickson:

Q. You were looking forward at the time?

A. Yes, sir.

Q. You say you were able to see three or four car lengths?

A. Yes, sir, just about that length.

Q. Then when you first caught sight of the man it must have been about three or four car lengths away?

A. About that distance, about two or three car lengths or maybe three or four. I could not just tell.

By Mr. Koons:

Q. Did you tell Mr. Young what you saw?

A. I did not have time to tell Mr. Young.

By Mr. Dickson:

Q. The collision occurred almost immediately afterwards?

A. Just a few seconds' difference.

Mr. Koons: Mr. Dickson, have you your rule book?

Mr. Dickson: Yes.

(Rule book produced by counsel for defendant and handed to counsel for plaintiff.)

John Carrigan, having been duly sworn, was examined and testified as follows:

By Mr. Koons:

Q. Where do you live?

A. Mauch Chunk.

Q. What is your occupation at the present time?

A. Conductor.

Q. Conductor for what company?

A. Central Railroad of New Jersey.

Q. Freight or passenger train?

A. Coal and freight mixed.

Q. And at the time of this accident you were conductor of Mr. Young's train, were you not?

A. Yes, sir.

Q. And you were on the train at the time of the collision?

A. Yes, sir.

Q. You were in the caboose at the time with Mr. Decker, I believe?

A. Yes, sir.

Q. As conductor you have charge and management of the train, do you not? What are your duties as conductor? What were your duties as conductor of that train on this day?

A. To look after the running of the train.

MR. DICKSON: If you are asking his duties under the rules, kindly tell me.

MR. KOONS: Under the rules of the company.

THE COURT: In a general way.

By MR. KOONS:

Q. Answer the question.

A. To look after the welfare of the train, to get it over the road.

Q. And where were you taking this train this day?

A. To Jersey City.

Q. From what point?

A. From Haucks.

Q. Haucks, Pennsylvania?

A. Haucks, Pennsylvania.

Q. Did you receive any orders from the company before you went out on this train?

A. Yes, sir. We received orders at Haucks before we started out.

Q. What were those orders?

A. To run extra from Haucks to Mauch Chunk.

Q. What else?

A. That is all, and a clearance card, for a clear track. A clearance card.

Q. What was that for?

A. That is to give you a clear track from there as far as your orders go.

Q. Your orders went as far as Jersey City?

A. No, sir, Mauch Chunk.

Q. How far did they go?

A. Mauch Chunk.

Q. And you had a clear track to Mauch Chunk?

A. We just get orders over the single track part. It is a double track from Mauch Chunk to Jersey City.

Q. Were those all the orders you got?

A. That is all the orders.

By The Court:

Q. Do I understand the orders were from Haucks to Mauch Chunk?

A. That is, the train orders over the single track.

By Mr. Koons:

Q. Were any orders given with reference to time?

A. No, sir.

Q. It was sort of an extra freight, was it not, that you ran?

A. Yes, sir.

Q. Do you know how many cars you had on this train?

A. Thirty-seven, I think.

Q. And how many of them were stock?

A. Seventeen, I think.

Q. And the rest were coal, were they not?

A. Yes, sir.

Q. And they were all loaded, were they not?

A. Yes, sir.

Q. The stock, of course, was cattle, and the others, you say, was coal?

A. Yes.

Q. What kind of coal cars? Were they the ordinary wooden cars, or steel cars?

A. They were mixed, wooden and steel both.

Q. As compared with this shifting train that came out at the cross-over at Siegfried, which train had the right of way?

A. The shifting train.

Q. You say it had the right of way?

A. Yes, sir.

Q. Why do you say that?

A. Because the rule gives them the right of way in the yard.

Q. The right of way in the yard?

A. Yes.

Q. What is their duty with reference to protecting themselves, or what were they to do when they got out on this main track, on this left-bound track?

A. What were they to do? They were not to do anything.

MR. DICKSON: I object to that question.

(Question withdrawn.)

By MR. KOONS:

Q. You did not see the actual collision, did you?

A. No, sir.

Q. Which is the superior train as compared between those two, the shifting train, or your train?

A. The shifting train in the yard limits.

Q. Within the yard limits?

A. Yes.

Q. When you say "superior," what do you mean by that?

A. She has the right over extra trains.

Q. Did you see these two semaphores above the cross-over, as you went along?

A. I saw them as we passed, yes, sir.

Q. What did they show?

A. They showed danger.

Q. Which semaphore showed danger?

A. They all showed danger on the hind end.

Q. But you did not see the semaphores before the engineer came to them, did you?

A. Not before our engine passed them.

Q. And you know, as a matter of fact, that when the engine passes the semaphores, then they change?

A. They show danger.

Q. But what they were before Mr. Young came to them, you do not know?

A. I could not see them.

Q. How fast were you going?

A. I judge about eighteen or twenty miles an hour.

Q. What is the first notice you had of the collision?

A. I met a steer coming up the track, after we had stopped.

Q. What did you see at the cross-over? What was the condition there?

A. I was not at the cross-over.

Q. What did you see of the cross-over? What was its condition?

A. I was not at the cross-over.

Q. Did not you see it at all any time after the accident?

A. I did not pay any attention to it. The hind end was below it when I started ahead.

Q. What did you see of the collision, the condition of the cars afterwards, when they came to a stop?

A. I saw they were piled up down behind the engine, that is, six or seven cars.

Q. That is, behind Mr. Young's engine, they were piled up?

A. Yes.

Q. And he was found underneath, dead?

A. Yes.

Cross-examination.

By Mr. Dickson:

Q. When did you leave Mauch Chunk?

A. About 7:16 or 7:17, as near as I can remember.

Q. Did you stop anywhere on the way?

A. Stopped at Perryville.

Q. How long were you there?

A. Seven minutes.

Q. What was the condition of the weather?

A. Very foggy at places.

Q. What yard limits did you pass through between Mauch Chunk and Siegfried?

A. Siegfried.

Q. Is Siegfried the first yard you came to after leaving Mauch Chunk?

A. Yes, the first yard limit board.

Q. Up until you passed that yard limit board at Siegfried you had been running through the open country, with no yard limits?

A. Yes, sir.

Q. How far apart were these semaphores that you speak of?

A. Some of them, I suppose, are very close to a mile apart.

Q. And after your engine had passed by them, and the cars had passed by them, and the caboose, when you saw them they were showing danger?

A. Yes, sir.

Q. When your engine reached this cross-over and ran into this small switch engine, did you feel anything, and if so, what?

A. A slight bump on the hind end.

Q. Just a slight bump on the hind end?

A. Yes.

Q. Were the brakes put on then?

A. No, sir.

Q. Was the air hose parted at that time?

A. No, sir.

Q. How far did the train go after that bump you speak of before it came to a stop?

A. Well, as near as I could judge, close on to half a mile.

Q. And when it stopped, where was the hind end?

A. West of the Siegfried Station.

Q. West of Siegfried Station?

A. Yes.

Q. So that the length of the train ran past the station, over this crossing that you speak of, and on to where the engine stopped?

A. About twelve or fourteen cars I judge went over this crossing.

Q. Twelve or fourteen cars had crossed the crossing, and that crossing was east of the Siegfried Station?

A. Yes.

Q. The rest of the cars lay west of the crossing?

A. Yes.

Q. How far west of the cross-over is the first semaphore you come to, that you describe?

A. Well, I think it would be about a quarter of a mile.

Q. And are there any other semaphores until you come to the yard limit board going west?

A. Between that and the yard limit west of that one?

Q. Yes.

A. No, the next one is west of the yard limit board.

Q. So, then, there is a semaphore before you reach the yard limit board, if you go east, as this train was coming?

A. Yes.

Q. And then you come to a yard limit board, then you come to a semaphore that is inside the yard limits?

A. Yes.

Q. Then you come to the cross-over switch?

A. Yes.

Q. Then you come to the Siegfried Station, then to the crossing, then to the place where the engine stopped, and that is the way the thing runs out in line?

A. Yes.

Q. Do I understand you to say that those two semaphores, one outside and the other inside the yard limits, were about a mile apart?

A. I judge about that.

Q. You were running as an extra train?

A. Yes, sir.

Q. You did not have the right of way, then, in the yard limits?

A. No, sir.

Q. How long have you been a conductor?

A. Six years.

Q. How long have you been in the railroad business?

A. Twenty-one years and ten months.

Q. What were you before you were a conductor?

A. Brakeman.

Q. A freight brakeman?

A. Yes, sir.

By The Court:

Q. Was this crossing within the yard limits?

A. Yes, sir.

By Mr. Dickson:

Q. Where is the other? At the east end of the yard?

A. It is down below Northampton Station, about probably half a mile.

Q. Is the cross-over where this accident occurred inside the yard limits?

A. Yes, sir.

Q. And is Siegfried Station in the yard limits?

A. Yes.

Q. You said that the shifting engine had the right of way and this train did not have the right of way inside the yard limits?

A. Yes, that is what I said.

Q. Do you base that on rules of the company or on instructions?

A. The book of rules.

Q. You base that on the company's book of rules?

A. Yes, sir.

Q. Are those rules in force?

A. Yes, sir.

Q. Did those rules govern all the management of that train?

A. Governed the management of the whole road.

Q. Did you have to pass an examination on those rules?

A. Yes, sir.

Q. Do you know whether the engineer had to pass an examination?

A. He had to, yes, sir.

Q. You had been running as conductor, you say, for about six years?

A. Yes.

Q. And under the rules of the company the yard engines had the right of way within the yard limits?

A. Yes.

Q. Did you ever see, before this accident occurred, any case where a yard engine was on the main tracks, within the yard limits, when an extra train was coming along? Did you ever see the case of a yard engine being inside the yard limits, on the main tracks?

A. Every day I see it when I am working.

Q. Every day you see it?

A. Yes, sir.

Q. It is the common ordinary running of the road?

A. Yes, sir.

Q. So that when your train comes along and enters the yard limits, you know there might be a yard engine in there in front of you?

A. We have got to look out in the yard limits with an extra train.

Q. When you have an extra train?

A. Yes.

Q. And those train orders you speak of, where you had a clearance card, that was where you were running on a single track?

A. Yes, sir.

Q. Outside of the yard limits you run on what? What governs your running of your train then?

A. We run the best speed we can make.

Q. The best speed you can consistently make?

A. Yes, with safety.

Q. What signals are there to govern your running outside the yard limits?

A. Automatic block signals.

Q. When inside the yard limits, with an extra train, you are governed by your yard limit rules. Is that it?

A. Yes, sir.

Q. You were not a scheduled train then?

A. No.

Q. You did not have to make any definite time?

A. We were an extra train.

Re-direct-examination.

By Mr. Koons:

Q. You say you must look out for yard trains?

A. Yard trains, yes, sir.

Q. Does that mean, when you come into the yard limits you are to stop your train?

A. No, sir.

Q. You proceed, do you not?

A. Proceed.

Q. According to what?

A. According to how far you can see ahead, with safety.

Q. And according to signals?

A. Yes, sir.

Q. And the semaphores are the signals that the engineers go by?

A. Outside of the yard limits.

Q. You are familiar with the book of rules?

A. I have gone through them. I have been examined on them.

Q. I show you a book of rules of the company. Will you show me anywhere in that book of rules that these semaphore signals do not apply in the yard limits just the same as outside of the yard limits?

A. I don't know about that. I never saw that, but there is rule 107 in that book that will show you where the yard engine has the right of way over the extra trains, to protect herself against scheduled trains.

Q. Will you point out rule 107, and read it to us.
A. I cannot see very good without my glasses.

MR. KOONS: If Mr. Dickson has no objection I will read it.

MR. DICKSON: I have no objection.

MR. KOONS: I read out of the rule book of the defendant company, produced on call by the defendant, as follows:

"107. Yard limits will be indicated by yard limit boards: within these limits yard engines may occupy main tracks, protecting themselves against scheduled trains. Extra trains must run through yards under control, looking out for yard engines, and other extras."

By MR. KOONS:

Q. Is that the rule you refer to?
A. Yes, sir.
Q. Was not this a scheduled train?
A. No, sir.
Q. It was not a scheduled train?
A. No, sir.
Q. Do you mean to say there were no rules with reference to protecting a train like yours, against the yard trains, being out on the track?
A. The extra train is supposed to look out for the yard engine, according to that rule, as far as I can understand it.
Q. But you are supposed to keep on running when you come into the yard limit?
A. We certainly are.
Q. What is it you are to look out for?
A. To look out for everything, that would be in the yard.
Q. What are those semaphores in the yard for, then?
A. What are they in the yard for?
Q. Yes.

A. Just the same thing as any place else, I guess.

Q. The same as any place else?

A. Yes.

Q. To give signals?

A. Warning.

Q. To the trainmen?

A. To give warning.

Q. To give warning?

A. Yes.

Q. And if those semaphores showed white, when Mr. Young came along, what did that indicate?

A. That indicated—

Q. A clear track?

A. A clear track there then.

Q. It indicated a clear track there then?

A. Yes.

Q. And whether or not they were white as he passed them, you do not know?

A. No, sir, I do not.

Q. You only know they were not white when you saw them?

A. Yes.

Q. But it is a fact, as the engineer passed these semaphores, they changed the signal to protect you against the rear train?

A. Yes.

Q. That is true, is it not?

A. Yes.

Q. So that if those semaphores were white, that meant there was a clear track?

A. A clear track at that time when he passed it.

Q. At that time, of course, and if he had a clear track it was within his duty to go ahead?

A. As far as he could see, with safety.

Q. He was not obliged to stop every few feet to feel his way?

A. No, sir, he was not.

Q. What was the duty of the shifting train?

Recess until two o'clock p. m.

2:30 p. m.

JOHN CARRIGAN, recalled.

By MR. KOONS:

Q. How did the size of the shifting engine compare with the size of Mr. Young's engine, larger or smaller?

A. It was a much smaller engine.

Q. How many cars had it on the morning of the accident?

A. Young's engine?

Q. No, the other engine.

A. It had no cars.

Q. Do you know what work it was engaged in at that time?

A. No, sir, I do not know what they were doing.

Q. You do not know whether at this time it was an extra train like your own, a passenger train, or a shifting train or what it was?

A. It was a shifting train, as far as I know.

Q. Do you mean to say that as a shifting train it was superior to your train?

A. Yes, sir.

Q. Will you show me anywhere in the book of rules of the company where a shifting train is superior?

A. It is in rule 107.

Q. Part of which says, "Within these limits yard-engines may occupy main tracks, protecting themselves against scheduled trains." That is correct?

A. Yes, sir.

Q. You notice the use of the word "may" do you not?

A. Yes, sir.

Q. That says yard-engines, does it not?

A. Yes, sir.

Q. Do you know whether this was a yard-engine at this time?

A. It was supposed to be, yes, sir.

Q. Do you know what the usual duties of that train were, where it came from and what it did?

A. Started from Bethlehem Junction.

Q. With what?

A. As a passenger train.

Q. Then what did it do?

A. Worked as a shifting engine until evening then.

Q. So it had varied duties to perform?

A. Yes, sir.

Q. Carrying workmen?

A. Yes, sir.

Q. Then it would do shifting work in and about the yard?

A. Yes, sir.

Q. Just what work it was doing at this time you do not know?

A. No, I do not.

Q. Or what character of train it was at the time you do not know?

A. I know it was a shifting engine at that time.

Q. That is your own interpretation?

A. Yes, sir.

Q. Do you know what a road-drill engine is?

A. Yes, I know what a road-drill engine is.

Q. Was this one?

A. I suppose she does work in different parts of the yard as far as I know.

Q. Do you know what a road-drill engine is?

A. Yes, sir.

Q. Was this a road-drill engine?

A. I do not know how far she goes during the day.

Q. Did I understand you to say that through the yard limits the signals did not apply to a train like yours?

A. It does not protect them any.

Q. Isn't this what you mean, that in addition to going by the yard signals, any engineer of a train like yours was also to watch out for other trains?

A. Other trains run under control through the yard.

Q. But he is guided by signals?

A. That is more to protect a schedule train, signals through the yard limits.

Q. Are they not also to protect trains like yours?

A. No, it does not give him any right to run fast through the yard.

Q. Show me in the book of rules where that is so stated.

A. 107 covers that whole thing, so far as I can see.

Q. That is your interpretation of Rule 107?

A. Yes, sir.

Q. Did you notice whether Rule 107 said anything about signals?

A. No, it does not.

Q. That is merely your own interpretation of it?

A. Yes, sir, that is my own interpretation.

Q. I believe you said that when the semaphore shows white, it shows clear track?

A. Shows clear track.

Cross-examination.

By Mr. Dickson:

Q. This rule had been explained to you, had it not?

A. Yes, sir.

Q. You understood the practice under the rule?

A. Yes, sir.

Q. Was this engine that was run into a train?

A. All extra engines is considered a train.

Q. I call your attention to a definition on page 7 in the book of rules of a train: "An engine, or more than one engine coupled, with or without cars, displaying markers."

A. Yes, sir.

Q. What are the markers?

A. White flags that they have up alongside the headlight.

Q. Do you know whether this engine had any markers on it?

A. I suppose she had.

Q. You did not observe any?

A. I did not take notice to that.

Q. Was this engine a freight engine or was it not?

A. It was a freight engine at the time.

Q. Doing freight engine work, was it not?

A. Yes, sir.

Q. What is the distinction between an extra train and the schedule train?

A. A schedule train has the right of track over all extra trains.

Q. A schedule train has a schedule on which it has to run and a timetable, does it?

A. Yes, sir.

Q. An extra train does not have a timetable, does it?

A. No.

Q. Do I understand you to say that the schedule train has this right of way through the yard as well as outside of the yard limits?

A. Just the same thing.

Q. But the extra train, when it reaches the yard limits, loses its right of way and must run under control?

A. They have to look out for everybody on an extra train.

Q. When you say run under control what do you mean?

A. To run under control is that you can stop in the distance you can see.

Q. Must be able to stop in the distance you can see?

A. Yes, sir.

Q. If you are running at eighteen to twenty miles an hour and the fog is such that you cannot see more than three or four car lengths, can you stop within the distance in which you can see?

A. No, sir.

Q. You said that when this semaphore signal showed white, that meant that there was a clear track at the time?

A. Yes, sir.

Q. And the block which is covered by that signal was how long?

A. Between that and the next signal.

Q. Where is the next one?

A. I judge it would be close on to a mile.

Q. Then that simply means that a mile of track in front of that train is clear?

A. Yes, sir.

Q. And after the train has passed, after your train did pass, you say it showed danger?

A. Yes, sir.

Q. Then if this yard engine came out upon the track after Young had passed by the signal, the signal showed danger anyway did it not, at that time?

A. Yes, it sure would.

Q. If it came out after his train passed, the signal was showing danger at that time?

A. Yes, sir.

(Counsel for plaintiff moves to strike out the testimony of the witness in answer to the last question, as being only a supposition.)

(Motion refused.)

Q. When you say the schedule train has the right of way what controls it in its running when it comes into the yard?

A. Clear boards.

Q. And the schedule train then relies on the boards?

A. Yes, sir.

Q. But the extra train, you say, has no right to rely on the boards?

A. No, it has not.

Q. Under the yard-limit rule?

A. Under that rule.

Re-direct-examination.

By Mr. Koons:

Q. Show us in the book of rules where it states that the extra train such as yours had no right to rely upon signals.

A. I cannot. That is all I have got for it, Rule 107.

Q. That is the rule covering all these things in your mind?

A. It covers that.

Q. And that is your own interpretation of that rule?

A. Yes, that is the way I was instructed.

Q. Who instructed you to that effect?

A. My rule instructor?

Q. When?

A. Six years ago when I went to Bethlehem.

Q. What is his name?

A. Charles Probst.

Q. What did he tell you?

A. Told me what I have just told you.

Q. Tell me the words he used.

The Court: I do not think that is proper.

By Mr. Koons:

Q. You say that is the only rule that covers that?

A. That is all.

Q. If this engine had no markers on it, was it a train under your book of rules?

(Objected to by counsel for defendant. Objection overruled. Exception for defendant.)

A. I cannot remember how that was. An engine with or without cars was a train.

Q. Whether it had markers you do not know?

A. I do not know whether it had markers or not.

Q. Did you see the engine afterward?

A. I seen it about twenty-five or thirty minutes after the wreck occurred.

Q. Did you see any markers on it?
A. I did not notice what was on it.
Q. Did you see the engine?
A. I saw the engine.
Q. Whether it had markers on it or not you do not know?
A. I do not recall.
Q. You will not say you saw it?
A. No, sir.

Mr. Koons: I have called upon the defendant to produce the book of rules in force at that time, and I have here the book of rules which they have produced, and offer the same in evidence, with special reference to the following definitions and rules.

(The said book is marked "Plaintiff's Exhibit No. 1.")

On page 7, under the heading of "Definitions," a train is defined as follows: "An engine, or more than one engine coupled, with or without cars displaying markers."

On page 19, Rule 91-A "Where no form of block signal is used, trains going in the same direction must be spaced at least five minutes apart at stations where there is an agent or operator on duty; after the departure of trains red must be displayed for five minutes, green from five to ten minutes, and white after ten minutes."

Mr. Koons: I will not offer in evidence that rule.

Rule 99, page 21: "When a train stops or is delayed under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. When recalled, he may return to his train, first placing two (2) torpedoes on the rail when the conditions require it. The front of a train must be protected in the same

way, when necessary by the front brakeman, or in his absence by the fireman.

THE COURT: What has that to do with this case? You may put the book of rules in evidence, but there is no use in reading the rules now, except so far as you may desire to have them recorded in the notes.

MR. KOONS: Rule 99-A, page 21: "On double track when a train crosses over to, or obstructs the other track unless otherwise provided it must first be protected as prescribed by Rule 99, in both directions on that track."

Rule 301, page 53:

Signal	Occasion for use	Indication	Name
(b) White	Block is clear	Proceed	Clear Signal

Rule 326, page 59: "To permit a train to cross-over or return the signalman must examine the block record, and if all the blocks affected are clear of approaching trains he will arrange with the signalman at the next block station on either side to protect the movement, and when the proper signals have been displayed permission may be given. Until the block is clear no train must be admitted in the direction of the cross-over switches except under Caution-signal or with Caution Card (Form 300 T D). All cross-over movements must be entered on the block records."

Rule 366, page 63: "When it is necessary for a train to cross-over, the conductor, before crossing or returning, must notify the signal man and obtain permission to do so."

Page 73, Requisites of Installations.

Page 74, paragraph 6: "The interlocking of signals with switches, locks, railroad crossings, or drawbridges, so that a clear signal cannot be given unless the route to be used is clear and stop signals displayed for all conflicting routes."

Page 74, paragraph 9: "The apparatus so constructed that the failure of any part directly controlling a switch or lock will prevent the display of the clear signal."

Rule 663, page 81, "Enginemen and trainmen must not accept clear hand signals as against fixed signals until they are fully informed of the situation and know that they are protected. Where fixed signals are in operation trainmen must not give clear hand signals against them."

Rule 997, page 102, relating to the duties of firemen. "While engine is moving they must keep a constant lookout when not engaged in firing, and be on watch if the engineman is obliged to look away from the track in front, until he can resume his lookout; they will give instant notice to the engineman of any signals or indication of danger or obstructions, or if there is any reason to believe the train has parted or has struck any person or object on the track."

Rule 998, page 102, relating to the duties of firemen: "They must carefully notice, as far as practicable, the position and indication of all fixed signals. They will keep a sharp lookout also for signals carried by other trains, and will keep in mind all orders and notices regarding the movement of trains, so as to be prepared to correct any oversight or mistake if there should be any occasion for so doing. They will see all train orders received and will read aloud such orders to enginemen."

JOHN H. BARTLETT, having been previously sworn, recalled and further examined as follows:

By MR. KOONS:

Q. Do you know what the duties of these shifting trains were?

(Objected to by counsel for defendant on the ground that the witness has been heretofore examined on the subject.)

(Objection sustained.)

Q. What did this train do, if you know of your own knowledge?

A. Supposed to be a road drill.

MR. DICKSON: I ask to have the answer of the witness stricken out.

MR. KOONS: Yes; I agree to that.

By MR. KOONS:

Q. What did it do? What was the first that it did, if you know?

A. Run as a first class train as far as Siegfried.

Q. And after that?

A. After that pushed coaches away and do roadway drill.

Q. What was that?

A. Drill—place cars in the cement work from Siegfried, run as far as West Allentown.

Q. Do you know what work it was actually engaged in at the time of the accident?

(Objected to by counsel for defendant.)

A. I know what the trains work at.

Q. You did not see it at the time of the accident?

A. No.

MR. DICKSON: I ask to have the evidence as to what this man did that day stricken out.

THE COURT: Let it be stricken out.

MR. KOONS: I ask your Honor for an exception.

THE COURT: You agreed that part of his evidence might be stricken out.

By Mr. Koons:

Q. As between that train and your train which had the right-of-way?

(Objected to by counsel for defendant as having been gone into. Objection sustained.)

Mr. Koons: In order to get these wages properly, I have called upon the defendant to produce the time-sheets of the defendant company. Beginning with December, 1908, his wages for the month of December were $134.07; January, 1909, $91.33; February, 1909, $80.63; March, 1909, $107.45; April, 1909, $102.49; May, 1909, $103.38; June, 1909, $76.65; July, 1909, $71.90; August,1909, $110.78; September, 1909, $112.93. He was killed on the 9th of October. I think we can agree that the average was about $100.00 a month.

Mr. Dickson: About one hundred dollars a month.

Mr. Koons: I have had a statement prepared showing it as amended, and I hand it to your Honor.

Plaintiff Closes.

Counsel for defendant moves for a non-suit, on the following grounds: First, that there is no proof of the negligence of the defendant company; second, that the only negligence shown by the evidence is negligence on the part of Young in not running under control, under the yard rules; third, that there is no proof of death; and fourth, that there was an assumption of the risks of his employment by Young.

Motion for non-suit overruled.

DEFENDANT'S EVIDENCE.

EDWARD L. GRAVER, having been duly sworn, was examined as follows:

By MR. DICKSON:

Q. Where do you live?

A. South Bethlehem.

Q. By what company are you employed?

A. The Central Railroad Company of New Jersey.

Q. How long have you been employed by that company?

A. Twenty-nine years.

Q. What is your position?

A. Conductor.

Q. Conductor having charge of what engine?

A. Engine 514.

Q. Engine 514 was the engine that was run into by this extra train?

A. Yes, sir.

Q. What was the condition of the weather that day?

A. It was foggy.

Q. What had you been doing on the westbound track before you crossed over to the eastbound track?

A. Had been placing a car of brick on the station siding at Siegfried Station.

Q. And then what did you do?

A. Then we went up the westward track to cross-over on the way to Catasauqua.

Q. Cross over to the eastbound track?

A. Yes, sir, to the eastbound track.

Q. Where were you when the engine made the cross-over movement?

A. I got off, going west, to set the cross-over switch on the eastward track.

Q. That is, you stepped off when you reached the eastward point of the switch?

A. Of the switch.

Q. This cross-over ran from the westward track to the eastward track, did it?

A. Yes, sir.

Q. And in which track was the westward end of that cross-over switch, running this way or that way (illustrating)? The westward point of the cross-over switch was in which track?

A. The westward track.

Q. So that the cross-over switch ran from the westward track and ran to the eastward?

A. Yes, sir.

Q. Slightly south, I suppose, over to the eastward track?

A. Yes, sir.

Q. And you stepped off your engine, as I understand it, beside the east end of this cross-over?

A. Yes, sir.

Q. And set that switch?

A. Yes, sir.

Q. And the other switch was set by whom?

A. By Brakeman Ryner.

Q. And when these switches were set, what did the engine do?

A. After the switches were set the engine came to the eastward, crossing over.

Q. What did you next see?

A. An engine came in sight on the eastward track.

Q. How far away was the engine when you saw it?

A. About four car lengths or five car lengths, something like that.

Q. Did you hear the approach of this engine.

A. No, sir, I did not.

Q. Had you heard any whistle or bell?

A. No, sir, I did not.

Q. Was any bell rung or whistle blown?

A. I did not hear any.

Q. When this engine came up, how fast was it going?

A. It was coming down.

Q. I mean coming down the eastbound track.

A. About twenty to twenty-five miles an hour, I should judge.

Q. And it was pulling cars, was it, or was it by itself?

A. No, it had a train of cars.

Q. What time was it that this train came along?

A. 8:17, as near as I can recollect.

Q. What was the next scheduled train due at that point?

A. The next schedule train was train No. 60, due there at 8:36.

Q. Nineteen or twenty minutes later?

A. Nineteen or twenty minutes later.

Q. Where were you when you saw this engine appearing through the fog?

A. Standing on the westward track about ready to get on engine 514.

Q. You were on the ground at that time?

A. Yes, sir.

Q. Where was Brakeman Ryner?

A. He closed the switch leading to the westward track, and about got on—I don't know just exactly—I think he was on the engine, or off—I don't know.

Q. Did you have any flag out to the westward?

A. No.

Q. Why not?

A. The rules did not call for it.

Q. By the rules not calling for it, what rule do you refer to?

A. Rule 107.

Q. When you became conductor, how long ago has that been?

A. Twenty-four years.

Q. How long, do you recall, had Rule 107 been in force?

A. Rule 107 has been in force, I do not know just exactly but it must be eight or nine or ten years, something like that.

Q. Had you been instructed in this rule; if so, by whom?

A. We were supposed to know all the rules and be familiar with them, in the book of rules.

Mr. Koons: I move that the answer be stricken out.

By Mr. Dickson:

Q. Had you been instructed in the rule, and if so, by whom?

A. No, sir; been instructed by the Book of Rules.

Q. You were given the Book of Rules?

A. Yes, sir; by the company; the company furnished the book of rules for me to live up to.

Q. When Young's train came up, please describe just what happened, as near as you can recall.

A. When he came down?

Q. Yes, when he came down the eastbound track.

A. The first thing I saw was his train, and I hollered to our engineer to pull her out, that there was a train; he pulled her out and started out. They struck our engine and kept right on going.

Q. How fast was your engine going at the time the other struck it?

A. Six or eight miles an hour, something like that, maybe a little faster.

Q. You say the train kept on going. Where was your engine?

A. Kept on pushing it down below the station, where I seen it the next time, Siegfried Station.

Q. When the train that Young was on went by you were or were not the brakes on that train set?

A. No; they were not when they went by me.

Q. The brakes had not been applied.

A. No, sir.

Q. Do you recall how far the cross-over switch was from Siegfried Station?

A. About thirty-five or forty car lengths.

Q. What did you next see? You say you saw this train coming up, pushing your engine ahead of it; what was the next thing you saw?

A. The engineer of our train, I saw him laying on the track.

Q. What had happened to him?

A. He either jumped out or was knocked out of the cab. I do not know how that was.

Q. Your engine was struck, suddenly thrown backward and was pushed ahead?

A. Yes, sir.

Q. What did you next see? Did you walk down to the scene of the accident?

A. Walked down, yes, sir, to the station; seen where the wreck was, below the station.

Q. What was wrecked; was your engine wrecked?

A. Very slightly, not much. His engine was wrecked some, and some of the cars were wrecked.

Q. Was your engine on the rails or off the rails.

A. On the rails.

Q. The other engine was off the rails?

A. Yes, sir.

Q. Young's engine, was it upright or was it fallen over?

A. It was in an upright position.

Q. What work did you say your engine was doing at the time; your engine had put in a car of brick on the siding?

A. Yes, sir; on the siding at Siegfried Station.

Cross-examination.

By Mr. Koons:

Q. When your train came out in this eastbound track, how long did you stop before you commenced to move down the track?

A. Did not stop; kept on going slowly.

Q. You must have stopped some time when you came out from the switch, didn't you?

A. A man can close up a switch and get on without the engine stopping.

Q. And you say you did not stop?

A. No; we might just about have stopped, not exactly; I could not say for sure.

Q. Then as you started to go down the eastbound track, you started very slowly at first, did you not?

A. Yes, sir.

Q. How soon after that was it that you started to go seven or eight miles an hour?

A. Shortly after we closed the westbound track switch.

Q. Five minutes?

A. Oh, no.

Q. About?

A. About two minutes, maybe, something like that, as near as I can get at it.

Q. What was your crew; whom did your crew consist of; give me the names and their positions.

A. Engineer Moyer; myself, Graver, conductor; fireman, Jacob Herman; Brakeman Albert Ryner, and Brakeman Decker.

Q. Where were all those men when you came out of the switch?

A. I sent one brakeman down the westward track to protect westward trains, so that we could place the car of brick on the station siding.

Q. You did send one brakeman down the other track?

A. Yes, sir.

Q. That was for the purpose of protecting your train?

A. Against that train—the westward track.

Q. Incidentally to protect that train and your train?

A. Yes, sir.

Q. Any train?

A. Yes, sir.

Q. What did you do with reference to any trains that might be coming down on the eastbound track, the track you were on?

A. We did not run against the current of traffic, there; kept right on.

Q. Very slowly, didn't you?

A. Went slow, yes.

Q. You knew that this freight train was running about this time every day, didn't you?

A. No, sir; nothing of it.

Q. Do you mean to say this was the first day it was running?

A. They run trains at all times.

Q. I mean this one; was this the first day this particular kind of a train was run; Mr. Young's train?

A. It was not the first day it was run. They run trains right along every day.

Q. How do you know that?

A. They have a right to.

Q. What notice did you have from any official in your company that this freight train of Mr. Young's was coming down on this track this day?

A. No notice.

Q. No notice whatever?

A. No.

Q. Had you seen Mr. Young with the same kind of a train the day before?

A. No.

Q. Two days before?

A. No.

Q. How long before?

A. I do not know that I ever seen him with a train of the same style before that I remember of. I did not just notice.

Q. As conductor of your train were you not sup-

posed to be familiar with the movements of trains on these tracks?

A. Yes, sir.

Q. You did not know of the movement of this one, of this freight train of Mr. Young's, did you?

A. I did not know the movement. I know what the rules call for.

Q. You had not noticed that this train was coming down on this track?

A. No.

Q. You sent out no flagman?

A. No, sir.

Q. You did nothing ahead of you forward or westward, to give any warning to approaching trains?

.A Westward.

Q. Take Mr. Young's train. You did not go north or westward on the eastbound track and put out torpedoes or anything?

A. Did not go north or west?

Q. You did not do anything?

A. No.

Q. Against what train were you protecting yourself in the rear which you have spoken about?

A. Protecting against the current of traffic, against trains that might come down. We were going down on the opposite track.

Q. Against what particular train?

A. Any train that might come along.

Q. Were there any markers on your engine?

A. No.

Q. You only had an engine?

A. We had an engine.

Q. No cars?

A. No cars.

Q. No markers?

A. No.

Q. Then your engine did not have the right-of-way over Mr. Young's engine, did it?

A. Yes; we were working in the yard.

Q. Do you know of any rule in your Book of Rules which gives you the right-of-way under those circumstances?

A. Rule 107.

Q. That is your own interpretation of Rule 107, is it not?

A. While we are working in the yard, we have the right.

Q. That is your own interpretation of Rule 107?

A. Yes, sir.

Q. You had no instruction on that rule?

A. No; what the book calls for there, that instruction.

Q. There are other rules in that book with reference to the movement of trains, are there not?

A. Yes, sir.

Q. This was not a yard engine, strictly speaking, was it?

A. It was an extra doing a yard engine's work.

Q. Sometimes did yard engine work, but a sort of an extra train?

A. Extra engine.

Q. Practically the same class of train as Mr. Young's?

A. No.

Q. Wasn't his an extra?

A. Yes.

Q. Yours was not a regular scheduled train, was it?

A. Ours was an extra yard engine.

Q. You did some passenger duty once in a while and you would drill cars; where did you go when you cut out?

A. Catasauqua.

Q. What for?

A. To do shifting.

Q. You were through with the shifting in this yard at that time, were you not?

A. Yes, sir.

Q. And for the time being you were not a yard engine; is that correct?

A. While we were in the yard.

Q. You were on the main track and were leaving your yard work, were you not?

A. The yard extends from there to Northampton.

Q. Were you not through with your yard work at this time?

A. I do not know whether they wanted to use us at the lower end or not, at Northampton or the lower end of Siegfried; have to get orders there to drill.

Q. Did you tell us what you were going to Catasauqua for?

A. To drill.

Q. You were through with your work in this yard at this time, weren't you?

A. As far as I know, unless they stopped us again.

Q. But they did not; you had no orders to stop?

A. Had orders to see whether there was any other work to do before we would leave there, yes.

Q. Had you received such orders?

A. Not yet; we were not there to receive them.

Q. Where would you have gotten them?

A. At the station there, or Northampton station.

Q. Do you mean to say that the company has been accustomed to running trains like this on the same track without putting out any protection for them?

A. No; the company does not run trains against the current of traffic without protection.

Q. This one came out; it was going very slowly at the time, wasn't it?

A. Yes, sir.

Q. And stopped possibly momentarily and then started very slowly backward?

A. Started moving slowly.

Q. And you knew as a conductor that any train going at a higher rate of speed than your train was would

collide with you if you did not get out of the way, didn't you?

A. Sure, if they were going at a higher rate of speed they would collide with us.

Q. It is not unusual for trains to go on the main tracks at higher rates of speed than you were going, is it?

A. Yes, it is unusual.

Q. To go at higher rate of speed than you were going?

A. Than we were going?

Q. Yes.

A. The other train—it was unusual to go in there at a higher rate of speed, I mean.

Q. But not a higher rate of speed than you were going?

A. We were not going at a high rate of speed.

Q. Is it usual for other trains to go on the same track at a greater rate of speed than you were going?

A. At times they do, yes.

Q. If they did go at the same time at a greater rate of speed they were bound to catch up and collide with you?

A. They are apt to.

Q. You know there are two semaphores within this block?

A. Yes, sir.

Q. One a short distance above the cross-over, about how far?

A. Very near half a mile.

Q. Then one above that?

A. Yes.

Q. And the space between the semaphores is called a block, is it not?

A. Yes.

Q. Do you know how fast he was going between these semaphores?

A. No, I do not know.

Q. How near was he when you first saw him?

A. About four car lengths away from me.

Q. Where were you at that time?

A. Standing by the cross-over switch.

Q. You saw that a collision was going to happen?

A. Yes.

Q. As a matter of fact, were you not so much excited by that oncoming collision that you did not notice what rate of speed it was coming?

A. No, sir.

Q. You were perfectly calm and cool, were you?

A. I was.

Q. You saw there was going to be a collision, but you were perfectly calm and cool, were you?

A. I was calm and cool, yes.

Q. You have given it as your opinion that the freight train was going about twenty-five miles an hour?

A. Twenty to twenty-five, as near as I can tell.

Q. Do you know what those semaphores were indicating as Mr. Young came along with his train?

A. No, I do not.

Q. Do you know what those semaphores are there for?

A. Yes, sir.

Q. What for?

A. To caution trains?

Q. If they are white it means that the track is clear?

A. At the time, yes.

Q. At all times doesn't it mean that?

A. Clear for that man at the time that he sees it there.

Q. It is a clear track for the man that is going down?

A. Yes.

Q. You say you heard no bell rung or whistle blown by the freight engine?

A. No, sir.

Q. Will you show us where in the Book of Rules anything is said about ringing a bell or blowing a whistle?

A. I did not see anything.

Q. It is not in there, is it?

A. No, it is not there.

Q. At this cross-over was there any indicator there?

(Objected to by counsel for defendant, as irrelevant.)

(Objection overruled. Exception for defendant noted by direction of the Court.)

A. No, sir.

Q. How long have you been in the railroad business?

A. Twenty-nine years.

Q. Do you know what I mean by an indicator?

A. I know what you mean, yes.

Q. Kindly describe an indicator.

(Objected to by counsel for defendant as improper. Question withdrawn.)

Q. The two cars came together with considerable force, didn't they?

A. The two engines.

Q. It was down grade at this point, wasn't it?

A. Very little down grade.

Q. There is some?

A. There may be some.

Q. You do not know what effect that collision at first had on Mr. Young, do you?

A. No, I do not.

Q. When did you first see him after the collision?

A. I seen him down at the wreckage.

Q. And there the two engines were still interlocked, were they not?

A. No, sir.

Q. Simply his engine had pushed the other down?

A. Yes.

Q. And his engine jumped the track and cars were piled up behind him?

A. Cars were piled.

Q. He was found under the cars?

A. Yes.

Q. Were there any evidences of a collision up at the cross-over, things strewn about?

A. There was a little coal around there that came off of engine 514.

Q. Mr. Young's train?

A. Engine 514.

Q. That was your train?

A. Yes, the work train.

Q. They came together with sufficient force to throw some coal out?

A. Some coal fell off the tank of the engine.

Q. And that was scattered about?

A. Yes.

Re-direct-examination.

By Mr. Dickson:

Q. Explain more clearly about that movement you made in putting that car of brick into the siding where you said you protected against trains on the westbound track. These two tracks, the two main tracks that you call the eastbound and westbound tracks, run parallel through this yard; is that correct?

A. Yes, sir.

Q. And Siegfried Station was east of the place of the accident, was it?

A. East of the place where they collided; yes, sir.

Q. About half a mile away?

A. Close to it, yes.

Q. This cross-over, to enable a car or engine or train to go from one track to another, ran from which track to which track?

A. From the westbound track to the eastbound track.

Q. That is, going in an eastward direction, facing the station, which end of the cross-over switch was nearest to the station?

A. The eastward end was nearest to the station.

Q. The westward end of the cross-over was the farthest from the station?

A. Yes.

Q. Where was the siding into which you put the car of brick?

A. That was close to a quarter of a mile below this cross-over switch, eastward of the cross-over switch.

Q. Which way did you enter into that siding?

A. From the westward main track into the siding.

Q. From the westward main track?

A. Into the station siding.

Q. The direction into this siding was from the westward main track going eastwardly into the siding?

A. Yes, sir.

Q. And that siding was to the north of the two main tracks?

A. It was on the side.

Q. Farthest away from the river?

A. Yes, sir.

Q. And where was this that you left the man with his flag to flag the westbound main track?

A. I sent him down before I started down.

Q. Before you started down, what do you mean by that? When you started eastward?

A. From the sidetrack where the brick was, where it was standing. I picked it up on the sidetrack—I do not know the number of the track, but it was at the upper end of the yard.

Q. You picked up the car of brick in the western end of the yards?

A. The westward end of the yard.

By The Court:

Q. Which track did you run on down there?

A. I went down the westward main track.

Q. Westbound track?

A. Westbound track.

By Mr. Dickson:

Q. You went contrary to the line of travel?

A. Went contrary to the current of traffic.

Q. As you came down from the upper end of the yard you had passed by the place where the cross-over switch was?

A. Yes, sir.

Q. And you had to go on another quarter of a mile before you came to the sidetrack where you wanted to put the car of brick?

A. Yes, sir.

Q. And you sent the man on ahead of you to enable you to reach that sidetrack; was that it?

A. Yes, sir.

Q. To keep you from being fouled in getting in there?

A. Yes, sir.

By The Court:

Q. You were protecting yourself against the current of traffic?

A. Yes, sir, against the current of traffic.

Q. We want to know what happened after that.

By Mr. Dickson:

Q. You had put your car into this siding off the westbound main track?

A. Yes, sir.

Q. Then you started again westward to the cross-over?

A. Yes, westward.

Q. And as you made this cross-over movement, did you make that with stops or pauses, or how did you make it?

A. I got off, when the engine was going west, set the switch on the lower side, the eastward side of the cross-over. The engine kept on going. Brakeman Ryner got off at the westward end of the cross-over, set that switch, and started back with our engine.

Q. The engine started back?

A. The engine started back. The brakeman was at one switch and got on, or about got on, when 184 came along and collided.

Q. So that your engine came off the westbound main track, took the switch, ran across the cross-over, took the switch into the eastbound main track and was making a continuous movement?

A. Yes, sir.

ALBERT RYNER, having been duly sworn, was examined as follows:

By MR. DICKSON:

Q. Where do you live?

A. Bethlehem.

Q. You are employed by the defendant company?

A. Yes, sir.

Q. You were a brakeman on engine 514?

A. Yes, sir.

Q. State what your engine did at the time of the accident.

A. We came down from Siegfried yard, on the way down to the lower end of the yard; before we crossed out on the westward track, the conductor sent a flagman down the westward track, so that we could get into a sidetrack, down into the station siding, what we call the station siding, about forty rail lengths. After we had the flag down there we proceeded down the westward track, against the current of traffic. After we had the car in there we came up the westward track, leaving the flag down there, because we were going down, east, and would catch them going down. The

conductor jumped off at the lower cross-over switch on the east-bound track, and I jumped off at the westward switch, and we laid there probably a minute or a minute and a half. Then we crossed over, and after the engine was over the first switch that I turned, I turned it back, and ran to the pilot. Just as I got on the pilot I seen the headlight of an engine coming through the fog. It was very foggy. I jumped off. I either got my handkerchief or my flag—I carried a flag in one hand and a handkerchief in the other, and I don't know which one I got—I signaled the engineer, but it was only a matter of form, because he had not time enough to stop. When I jumped off our pilot I hollered to our engineer to pull her out, otherwise he would strike her sideways, and he just got down to the point of the lower switch when he struck, pilot to pilot. Our engineer was knocked out or fell out; at least we found him there about three car lengths below the lower cross-over switch. I found his watch I think about two rail lengths before the cross-over switch. This is our engineer. It took our engine clean down, if I am not mistaken—could only see about three car lengths—and it took our engine clean down to the crossing and there was where the wreck occurred. That is about three rail lengths from where she struck until the pile-up occurred.

Q. How fast was your engine going when it was struck?

A. He might have got her going about probably four miles an hour or five miles an hour. I can walk five miles an hour, and I should say he got her going that fast.

Q. How fast was the other train going?

A. He was coming along at twenty-five miles an hour.

Q. He was going fast?

A. Yes, sir; in my judgment, at least. I was a little bit—I was not in a position to judge at the time

how fast they were going, because it was a bad time to judge in regard to how fast. I am positive it was going twenty-five miles an hour. He may have been going faster.

Q. You say the flagging that was done on the westbound track was to let you take the car down against the traffic, is that it?

THE COURT: We are not interested in what they did before.

By THE COURT:

Q. Where did 184 catch up with your engine?

A. On the point of the lower cross-over switch is where they struck and then pushed ahead.

By MR. DICKSON:

Q. Your engine had just gotten out onto the track, is that it?

A. Yes, sir.

Cross-examination.

By MR. KOONS:

Q. What part of the train were you when you first saw Mr. Young's train?

A. I was on the pilot of our engine.

Q. Naturally, when you saw his train so near, you were somewhat excited, were you not?

A. I knew what was going to happen.

Q. You did not have much time to observe what rate of speed Mr. Young was going, did you?

A. Not exactly, but I am positive that he was going twenty-five miles an hour.

Q. That is your opinion formed under the circumstances?

A. Yes, sir.

Q. Do you know where your engineer was killed, how near the cross-over? How soon after the collision was he killed?

A. He must have been knocked out when it struck, because the door was knocked off of the cab.

Q. Do you know where they found your engineer's body?

A. It was me that found him.

Q. Where did you find him; how far from the cross-over?

A. I think about three rail lengths below the cross-over.

Q. How many feet are in a rail length?

A. Thirty feet.

Q. So we would have about one hundred feet, would we not?

A. One hundred feet or less; yes, sir.

Q. Below where the engine was struck you found your engineer?

A. Yes, sir.

Q. Dead?

A. No, sir, he was not dead.

Q. Hurt?

A. Yes.

Q. Hurt so badly that he died shortly after?

A. He died shortly after.

Q. How soon after?

A. I think somewhere around noon. I am not positive. Either on the way to the hospital or at the hospital.

Q. You say the door was knocked off the engine; the fire-box door?

A. No, the front door of the cab.

Q. Had your engine come out clear from the other track, and was it clear on the eastbound track when it was struck, or was there a little of a sideswipe?

A. No; it was struck fair and square on the pilot.

Q. Just about got on the track?

A. Yes, sir.

Q. Was there any motion at the time of the collision to your engine?

A. Yes, sir.

Q. Just about moving, wasn't it, at the time?

A. Yes; he pulled her out, gave her sand, and she slipped on him.

Q. When he saw the other train coming he hurried and put on the steam to back away?

A. He did not see it. I guess he heard me holler. The fireman said he heard me holler, and he told him to pull her out. I could not say whether he heard me.

Q. You saw the speed of your engine increase after that?

A. Yes, sir.

Q. Then the two engines together went down to where Mr. Young was found?

A. Yes, sir, somewhere down there; I could not say how far.

Q. Did your engineer jump off his engine when the collision came?

A. No, sir, he was either knocked off, because the door and all was out.

Q. You don't know whether he jumped off or not?

A. No, that I could not say. He must have been knocked out.

Q. What effect the collision had on Mr. Young you do not know either?

A. It could not have had much effect, because we were only a light engine, and they had a big train.

Q. Did you see what effect it had on him at the time of the collision?

A. No.

Q. You don't know, do you?

A. No.

Q. You did not see him until you found his dead body?

A. I did not see him at all, not even after he was found.

Q. Did you jump off the train when the collision occurred?

A. I jumped off before. Just as soon as I seen it coming I jumped off, and I gave a signal either with a handkerchief or a flag. I don't know which I got.

Q. Just about when Young's engine was on you, you waved something?

A. Yes; just as soon as I could see him over the cross-over, you could not see far—two or three car lengths.

By The Court:

Q. How was your engine running west at the time it was struck, was the pilot towards Young's engine or the other way?

A. Head to head, face to face.

Q. You were on the pilot?

A. On the pilot.

Q. So that your engine was running backward?

A. Running backward, away from Mr. Young's train.

By Mr. Dickson:

Q. You were running eastward?

A. Yes; the same as Mr. Young's train. We were running backward.

Q. Herman is your fireman?

A. Yes.

Q. He is not here today, he is sick?

A. I understand he is sick in bed.

Lewis Laub, having been duly sworn, was examined as follows:

By Mr. Dickson:

Q. What is your position?

A. Gateman.

Q. What company are you employed by?

A. Central Railroad of New Jersey.

Q. You are gateman at the crossing just below Siegfried Station?

A. Yes, sir.

Q. Were you gateman and holding that position on the day of this accident?

A. Yes, sir.

Q. Just tell us what you heard and saw.

A. I was about sixty feet east of the crossing when they came down. Just as they passed me the two engines parted and stopped the train, and the engine went off the track, and seeing the engineer on the footboard—I saw him on the footboard.

Q. And then what happened to the engine?

A. The engine went off the track.

Q. Then what happened?

A. About 180 feet below that the cars jumped off the track down the bank.

Q. What happened to the engine?

A. The engine was off the track; did not fall over.

Q. When did the engine stop; how did it stop?

A. Stopped about 180 feet or so below the crossing.

Q. Did the engine fall over?

A. No, sir.

Q. How fast was the engine going when it passed by you?

A. It was going at least twenty miles an hour.

Q. How far could you see that day?

A. Not very far; it was very foggy.

Q. Did you see what became of the engineer? You say you saw him on the running board when he went by.

A. He was on the running board; that was the last I seen him.

Cross-examination.

By Mr. Koons:

Q. You do not know whether Mr. Young jumped off his engine or not, do you?

A. No, sir, I do not. I could not say that.

Q. When you saw him he was on the running board?

A. Yes, sir.

Q. And you don't know whether up to that time he had received any injury, whether he had been injured by the collision, falling off?

A. No, I could not say that.

Q. After you saw him on the running board the cars went about 180 feet; the cars left the track and ran quite a distance off the track?

A. Yes, sir.

Q. Of course, the cars backed and piled on top of him?

A. Yes.

Q. Did you see his body afterward?

A. No.

PATRICK A. GARRAGH, having been duly sworn, was examined as follows:

By MR. DICKSON:

Q. Where do you live?

A. White Haven?

Q. You are employed by the Central Railroad of New Jersey?

A. Yes, sir.

Q. In what position?

A. Supervisor of Signals.

Q. Did you have that position on October 9, 1909?

A. Yes, sir.

Q. What did you do on that day, October 9?

A. On October 9 I was on my way to Mauch Chunk when I heard of the accident. I went over and got on the Lehigh Valley passenger train and had them leave me off opposite where the wreck happened. I went over there. I went up to where the signal was, and seen that the signal was at danger when the wreck—

Q. Which signal?

A. 962, west cross-over.

Q. Is 962 the first signal west of the cross-over?

A. Yes, sir.

Q. How far is 962 from the cross-over?

A. About three thousand feet.

Q. Is 962 inside of the yard limits?

A. Yes, sir.

Q. How far west of 962 is the next signal?

A. About a mile.

Q. You say you found that 962 was set at "Danger" when you arrived there?

A. Yes, sir.

Q. How soon after the accident was this?

A. Within an hour and a half afterward.

Q. Was the wreck still on the track?

A. Yes, sir.

Q. In the block?

A. Yes.

Q. What if anything did you do to test those signals?

A. After the train, the wreck train, got out of the block, my man and I came back to the switches in question. I myself went up and had my man throw the switches, to see if the signal was working in conjunction with the switches, which they were. When they throwed the switch the signal would go to "Danger".

Q. The switches you are speaking about, are they the cross-over switches?

A. Yes, sir.

Q. And what is the effect upon the semaphore signal that you spoke of west of this cross-over, of moving the switch say so as to permit a train to come out from the westbound track into the cross-over?

A. By opening the switch at either end of the cross-over it will hold the signals in either direction.

Q. Either to the right or left?

A. Either right or left, east or west.

Q. Is that the way these signals worked?

A. Yes, sir.

Q. And you tested them within an hour after the accident?

A. Just as soon as the wreck train got off there.

Q. It was an hour after the accident that you arrived there?

A. Yes.

Q. The wreck was not cleared up for several hours?

A. Yes, sir. I could not say exactly when it was cleared up; but just as soon as the wreck train got out, then I tested the switches.

Q. You tested both switches?

A. Yes.

Q. When you set the switch what happened to the signal?

A. The signal went to danger, when there was nothing in the block.

Q. The signal went to danger when there was nothing in the block?

A. That is, after the wreck train was gone clear, one board came to clear; and just as she opened the switch, that throwed the board to danger.

Q. How long had the switches been inspected before the accident?

A. Two days prior to the accident.

Q. How about the signals?

A. The signals the same.

Q. This signal system that you have in operation there at Siegfried, how does that compare with the signal system along the rest of the road; is it the same or different?

A. It is the same as at any other point along the road.

Cross-examination.

By Mr. Koons:

Q. You spoke of switches; do you mean the indicator?

A. No, sir.

Q. You hadn't any indicator?

A. No, sir.

Q. You had a switch light?

A. The switch.

Q. What was there on the switch?

A. Here is a switch box.

Q. And in there was a light?

A. No, there are wires coming in there, leading from one track into the side of the box. There are wires in the switch box.

Q. You saw this place about an hour after the accident?

A. Yes.

Q. And then you say you found both semaphores at what?

A. At danger.

Q. What do you mean?

A. When they are up in that position (illustrating).

Q. And what color?

A. Red and green.

Q. That meant danger, did it?

A. Yes, sir.

Q. And if they are white it means clear?

A. Yes, sir; that is, if the board was in a horizontal position it meant clear.

Q. Are they in a horizontal position when they are white?

A. Yes, sir; when they are clear they are down like that (illustrating).

Q. And they are white?

A. Yes; they indicate clear.

By Mr. Dickson:

Q. You mean perpendicular?

A. Yes.

By Mr. Koons:

Q. White is the clear signal?

A. In that position (illustrating) is our clear signal, and that (illustrating) is our danger signal.

Q. And when that way, what is the color?

A. Red and green.

Q. And when down this way (illustrating)?

A. It is the same board that comes down.

Q. Does it change the color then?

A. From the position, horizontal and—

Q. You mean to say you signal merely by the position of the arm?

A. By the position. The top blade is red, governing the first block; the second is green, governing the second block.

Q. How many blades are on the first semaphore that you come to?

A. Two.

Q. What are the colors of those?

A. Red and green.

Q. What is the color of the other one?

A. Which other one?

Q. Did you not say there were two blades on the first semaphore?

A. Two blades; yes, sir.

Q. What is the color of the other blade?

THE COURT: He said one was red and the other green.

By MR. KOONS:

Q. Do you mean to say both sides of it, of the board?

A. No, sir.

Q. Do you mean to say there is no blade in there showing white?

A. No, sir, there is no white blade on there—red and green.

Q. Are you positive of that?

A. Yes, sir.

Q. Therefore the first semaphore cannot show white any way at all, either up or down?

A. The position of the arm indicates.

By The Court:

Q. The two blades are red and green?

A. Yes.

Q. If the blades are not horizontal then it is safe? If they are not sticking out, it is safe?

A. Yes, sir.

Q. If they are up it means red?

A. Yes, sir.

Q. Or green?

A. Yes, sir.

Q. When the switch is opened for an engine to come into this westbound track, what would happen to the signal?

A. From the eastward track?

Q. Yes; if they were on the westbound track, this engine, and the switch was opened so that it could pass to the eastbound, what happened to the signal when it was opened?

A. Just as soon as they opened the switches which controlled that, the semaphore arms went to danger.

Q. And that would indicate that the block ahead was occupied?

A. Yes, sir.

Q. And when it would come on the eastbound track, and the switch was closed again, what would happen?

A. It would remain the same. The wheels of the engine would keep it that way, at danger.

Q. And when it went into the eastbound track?

A. Yes, sir.

Q. And that would remain how long?

A. Until the engine got out of the first block, and the top arm would come down; and after the engine got out of the second block, provided there was no train came there, the second arm would come down.

Q. So that if the switch was opened to allow an engine or train to pass from the westbound track into the eastbound track, the danger signal would be up un-

til that engine had passed into the eastbound track and gone the block?

A. Yes, sir.

By Mr. Koons:

Q. You say you found both the semaphore arms down?

A. No, sir; I found them at danger.

Q. Both sticking out straight?

A. Yes, sir.

Q. At right angles to the post?

A. Found them in that position (illustrating).

Q. Both semaphores?

A. On that signal 962, in that position.

Q. Is that the one right above the cross-over.

A. Yes, sir, 962, if that is the signal there; about 3,000 feet.

Q. From the cross-over?

A. Yes, sir.

Q. The first one?

A. Yes, sir.

Q. Did you see the one above that? Did you see the other semaphore that was up?

A. No.

By The Court:

Q. The one you saw you say was 3,000 feet—which would be half a mile?

A. Yes, more than that.

By Mr. Koons:

Q. You only saw one?

A. That one that governed the cross-over, that is all.

Q. That is the only one that you have to govern that cross-over?

A. Yes, sir.

Q. That one stood at danger?

A. Yes, sir.

Q. Suppose it had stood at "Proceed" or "Clear"

before Mr. Young's engine passed down the line, what would it do after his engine got over it?

A. It would have went to danger, provided there was no switch open.

Q. So that when Mr. Young came down here that was standing at "Proceed"?

A. That I don't know.

Q. Didn't you say to me that after the train moves over—

THE COURT: After passing this, if the engine came on, they would not see it.

By THE COURT:

Q. After Mr. Young's engine passed the signal which said "Proceed", after his train had passed that signal, would it show danger?

A. Yes, sir.

Q. It would show that he was on the block?

A. That he was on the block.

By MR. KOONS:

Q. And therefore Mr. Young did have a clear signal?

A. That I don't know.

Q. Are you familiar with the signals?

A. I was not on the ground at the time.

Q. Did any other trains pass along after Mr. Young's train?

THE COURT: He of course could not tell; he did not see it.

By MR. KOONS:

Q. What does the rule book mean when it says that the semaphore shows white?

A. When the signal is in that position (illustrating).

Q. That is what the trainmen call white?

A. Yes; clear.

Q. And when they are up the way you indicated, they call that red and green?

A. Danger.

Q. When they say white or clear they mean pointing down?

A. In that position (illustrating).

Q. Does that mean both arms?

A. The top blade governs the first block. If the red blade is down it tells you the first block is clear; if the second blade is down it tells you that the second block is clear, beyond the first signal.

By The Court:

Q. It shows two blocks ahead?

A. Yes, sir; providing there is no train ahead.

By Mr. Koons:

Q. These semaphores are connected with the switches at the cross-over, are they not?

A. Yes, sir.

Q. Does the semaphore govern the switch and signal or does the switch govern the semaphore?

A. The switch governs the semaphore. That is, first open the switch and the semaphore is at clear. Just as soon as you open the other end of the cross-over switch you will throw it to danger.

Q. If it does not, there is something wrong with the switch or semaphore, is there not?

A. If it does not throw it to danger, which we have never found.

Q. Isn't that the case?

A. No, it is not the case.

Q. I am not asking you what it did in this case; but you say if the switch is turned, is that it, when a car comes out on the track?

A. If the switch is turned.

Q. What does it do to the semaphore?

A. Throws it to danger, providing it is clear.

Q. If it was clear before a train got on the same track, and the switch is turned, it throws it to danger, it throws the semaphore to danger?

A. Yes, sir.

Q. And if the switch is not turned, what then?

A. If the switch is not turned?

Q. Suppose as soon as he gets out he turns the switch back, what happens then?

A. It is at danger, because the engine on the main track is holding it that way.

Q. How is he holding it that way?

A. Cutting the power off that is operating that signal.

Q. If the semaphore in such condition does point to "Proceed" and "Clear", there is something wrong with your switch connection with that semaphore, is there not?

A. It was not wrong at this point, because they were working all right on the day in question.

Q. After the accident; that is what you mean?

A. Yes, and two days prior to the accident.

Q. That is all you know?

A. Yes.

Q. Whether the signals were pointing clear or not at the time of the accident you don't know, do you?

A. That I don't know, how they were.

Q. You don't know what signals Mr. Young had as he came down the track?

A. No.

Q. For whose protection are these semaphore signals at this block, the first and second one?

A. For the safety of trains.

Q. All trains, are they not?

A. All trains, yes.

Re-direct-examination.

By Mr. Dickson:

Q. Suppose the yard engine 514 had not yet thrown the switch when engine 184 with Young on it came along towards this signal, and there was no other train or engine in the block, how would the signal be shown?

A. With nothing in the block, or the block ahead, and no switches open in that block, is that it?

Q. Yes.

A. They would show clear.

Q. And if Young's train came along and reached that signal, and passed it, I understand that it would then go to danger?

A. Yes.

Q. And what effect, if any, on that signal would the additional coming out upon the eastbound main track of this engine 514 have, after the signal was already at danger?

A. None.

Q. I show you three photographs of a semaphore signal, calling your attention to the number upon the signal, and ask you if you can tell what signal those photographs represent?

A. That photograph there (indicating) represents 962, the first signal west of the cross-over where the accident happened.

Q. That is the signal you have been speaking about as being operated by this switch at the cross-over?

A. Yes, sir.

Q. And the three positions which are indicated by those pictures are what?

A. Clear, danger and caution.

Q. Danger is both arms up?

A. Yes, sir.

Q. Caution is one board up?

A. Yes.

Q. And clear is both arms or boards down?

A. Yes, sir.

Re-cross-examination.

By Mr. Koons:

Q. Did you make these photographs?

A. No, sir.

Q. Do you know whether they are photographs of these semaphores?

A. Yes, sir.

Q. How do you know?

A. By the location.

Q. You were not about when the photographs were taken, were you?

A. No.

Q. They were handed to you as being photographs of these semaphores?

A. Yes, but the location here tells me, and the lay-out of the land, just where they are.

Q. You say this semaphore above the cross-over was 3,000 feet away?

A. Yes, sir.

Q. No other semaphore between that and the crossing?

A. No.

Q. What was there to guide Mr. Young's movement between this last semaphore and the cross-over, to tell what was the condition of the cross-over? I understand that this semaphore, the one nearest to the crossing, was 3,000 feet away.

A. Yes, sir.

Q. To the west?

A. Yes, sir.

Q. On the eastbound track?

A. Yes, sir.

Q. What was between this semaphore and the cross-over where the accident happened to guide Mr. Young's movement of his train?

A. No signal at all.

Q. No signals whatever?

A. No.

Q. What provision was made for his protection?

A. That I don't know. I am no operating man.

Adjourned to Thursday, February 22, 1912 at 10 a. m.

SECOND DAY.

Philadelphia, Pa., Thursday, February 22, 1912, 10 a. m.

Present:

Parties as before noted.

TOM R. DAY, having been duly sworn, was examined and testified as follows:

By MR. DICKSON:

Q. Where do you live?

A. Philadelphia.

Q. By what company are you employed?

A. Pennsylvania Railroad Company.

Q. Were you ever employed by the Central Railroad of New Jersey?

A. I was.

Q. In what capacity?

A. First as a rod man, then as a level man, then as a transit man, in the engineering department.

Q. You were in the engineering department?

A. I was.

Q. Did you have anything to do with making surveys?

A. I did.

Q. And measuring distances?

A. Yes, sir.

Q. Did you make a survey of the scene of this accident, the tracks and switches?

A. I did.

Q. Starting to the west—that is, the Mauch Chunk end—near what point is the western yard limit board, at the western end of this yard?

A. The yard limit board is 32 feet east of the 97-mile post.

Q. By the "97-mile post," you mean that that is the post marking the mileage of the railroad?

A. It is.

Q. Which way does it count from? 97 miles from where?

A. From Jersey City.

Q. Now, as you come east from the yard limit board, which is the first block signal that you reach on the right-hand side, showing the condition of the blocks for the east-bound main track?

A. It would be automatic signal No. 962.

Q. 962?

A. Yes.

By Mr. Koons:

Q. Did you say automatic block signal?

A. Automatic block signal.

By Mr. Dickson:

Q. 962.

A. Yes.

Q. And how far is 962 east of the yard limit board? Your plan omits something, does it not?

A. That is 2,637 feet. That is automatic signal 962 east of the yard limit board.

Q. In other words, to get this clear, is 962 one-half mile inside of the yard limit, within the yard half a mile?

A. It is a little over half a mile.

Q. 37 feet over.

A. 37 feet.

Q. What is the next block signal on the right-hand side, showing the east-bound main track conditions as you come eastward?

A. It is automatic block signal No. 952.

Q. No. 952?

A. Yes.

Q. How far is that away from 962? You have to add several distances there, do you not?

A. 4,479 feet.

Q. Where is block signal 952 with reference to the Siegfried Station? Is it east or west?

A. 962, did you say?

Q. 952.

A. That is west of the Siegfried Station.

Q. So that if you start with the yard limit board on the west, it is a little over half a mile to 962, and it is over 4,000 feet to 952, and you have not yet reached the Siegfried Station?

A. That is correct.

Q. Are you still in the yard limits?

A. You are still in the yard limits.

THE COURT: Cannot you give us the entire yard limits, the two extremes?

MR. DICKSON: Yes, sir.

By MR. DICKSON:

Q. Where is the east end of this yard shown on your plan? First of all, is it east or west of Siegfried Station?

A. It would be east of the Siegfried Station.

Q. It is east of the Siegfried Station. I do not think that is shown on the plan.

A. It is not shown on the plan. It is between Siegfried Station and the station east of that.

THE COURT: Does he know?

By MR. DICKSON:

Q. How do you know that?

By THE COURT:

Q. Do you know the yard limits?

A. I could not define the yard limits.

THE COURT: You had better have somebody of your company show the two limits. Then his survey comes in very well, to show the distances. You can go on with him now, if you wish, but I

think it would be more logical to do it the other way.

By Mr. Dickson:

Q. Did you come to the yard limit board in the preparation of this plan which extends to and includes the Siegfried Station?

A. That showed the yard limit board on the approaching west side of the Siegfried Station.

Q. Have you reached the one on the east?

A. We did not take it into consideration in this survey.

Q. How far east of signal 962 is the cross-over from the west-bound to the east-bound main track?

A. 962 to the cross-over, to the east-bound or west-bound track, is 3,062 feet.

Q. You said your next block signal was something over four thousand feet from that 962. Do you mean this cross-over then lies between the two block signals? Do you mean the cross-over is between the two block signals?

A. It is between the two block signals, but which signals do you have reference to?

Q. 962 and 952.

A. It lies between 962 and 952.

Q. Then, if I have got that clear, your first block signal, 962, is half a mile or a little over, beyond after you passed the west end of the yard, going eastward, and you then have about three thousand feet to the cross-over, then you have a little over another one thousand feet to the next block signal?

A. That is correct.

Q. And how far is it from the cross-over to the highway crossing which is east of the Siegfried Station?

A. 1,985 feet.

Q. 1,985 feet?

A. Yes.

Mr. Koons: From the cross-over to Siegfried Station?

Mr. Dickson: No, that is from the cross-over to the highway crossing, which is below the Siegfried Station. As I understand it, at the highway crossing is where the derailment took place.

The Court: From the cross-over to Siegfried?

Mr. Dickson: From the cross-over to the highway crossing, which is just below Siegfried Station, where the derailment took place. It is 1985 feet?

The Court: Does that road have a name?

By Mr. Dickson:

Q. That highway crossing, what is the name of the highway crossing?

A. West 21st Street.

Q. Where does the point of the freight station siding start in from the west-bound main track with reference to the cross-over that we have been speaking of?

A. That is 1,280 feet east of the cross-over. That is taken from the west end of the cross-over.

Q. How long is the cross-over?

A. 187 and a half feet.

Cross-examination.

By Mr. Koons:

Q. You are referring to 962, are you not?

A. No, sir.

Q. When did you make this plan?

A. I made the survey.

Q. When did you make the survey?

A. October 16, 1909.

Q. You personally made the survey?

A. I did.

Q. You are speaking of two cross-overs or two semaphores. One is 962, and that one is at what you call the upper end of the yard, I believe?

A. 962 is towards the upper end of the yard, yes, sir.

Q. You are only speaking of two semaphores, are you not, one west of the cross-over, and one below the cross-over?

A. There are three semaphores.

Q. There are three semaphores?

A. Yes, sir.

Q. Beginning at the semaphore nearest towards Siegfried Station, and going westward on the east-bound track, how far is it from that semaphore to this cross-over that we are speaking of?

A. Let me have that again.

Q. Beginning at the Siegfried Station side, taking the semaphore on that side, and then going westward or northward, as you may call it, on the east-bound track, how far is it from that semaphore to this cross-over?

A. That is 1,417 feet. That is going westward on the east-bound track.

Q. 1,417 feet?

A. Yes.

Q. I will call that the lower semaphore.

A. That is No. 952.

Mr. Dickson: You are speaking of the one east of the cross-over?

Mr. Koons: Yes, the lower one towards Siegfried Station. That is 952.

By Mr. Koons:

Q. Leaving the cross-over and still going westward or northward on this east-bound track, how far is the next semaphore from the cross-over?

A. From that cross-over to the next semaphore, which is 962, is 3,062 feet.

By The Court:

Q. What is the first?

A. 952.

Q. 952 is at Siegfried?

A. Yes.

Q. That is 1417 feet to the crossing?

A. Yes.

Q. Then it is 3,062 feet to semaphore 962?

A. Yes.

By Mr. Koons:

Q. Still going westward or northward on this same track, how far is it to the next semaphore, and what is its number?

A. 5,866 feet.

Q. And the number of the semaphore?

A. 972.

Q. An automatic?

A. It is. From signal 962 to 972 is 5,866 feet.

Q. A little bit over a mile, is it not?

A. 5,866 is, yes.

Q. Is 972 within the yard limits?

A. 972 is west of the yard limits.

Q. How far?

A. 3,229 feet.

Q. You arrived at these figures by your measurements on your plan there?

A. And by the survey that I made, yes, sir.

Q. How many tracks are there at semaphore 972?

A. Two tracks.

Q. Both main tracks, are they not, east-bound and west-bound main tracks?

A. West-bound and east-bound tracks.

Q. How many tracks are there at semaphore 962?

A. There are three tracks.

Q. Two main tracks and what else?

A. One is a siding or a side track.

Q. And where is the cross-over for that siding, eastward from that semaphore or westward?

A. What do you mean by "cross-over"?

Q. This siding—there must be some way to get on to that siding from the main track. Where is the switch over where that siding comes into the main track?

A. The west end of the siding, the switch at the west end of the siding is east of 961 signal. That is the signal on the west-bound track.

Q. That is on the other side?

A. That is on the west side of the siding.

Q. So that there is no siding along the east-bound track at this place, then? There is no siding on the east-bound track?

A. No, there is not.

Q. The east-bound track is next to the river?

A. Next to the canal.

Q. The river, of course, is beyond that. Which is the first cross-over on this east-bound track as you come eastward on the east-bound track, the one we have been speaking of? Is that the first one?

A. Which tracks do you mean?

Q. Coming east on the east-bound track, when do you first come to a cross-over, this one we have been speaking of?

MR. DICKSON: Coming from where?

MR. KOONS: Coming eastward on the east-bound track above the cross-over.

THE COURT: From 972.

By MR. KOONS:

Q. We will say from 972, to make it more specific.

A. The cross-over which is 1417 feet west of 952.

Q. That is the cross-over in question, is it not, the one where the accident happened?

A. I believe so.

Q. That is the only cross-over, is it not?

A. It is the only cross-over, yes, sir.

Q. They come in from the cement factory or plant, whatever you call it, on that side?

A. What do you mean?

Q. Are not there a number of tracks? First we have the east-bound track, and then the west-bound track and then the sidings between those two tracks and the cement works. Is not that where the sidings are?

A. There are no sidings between the east-bound and the west-bound tracks.

Q. Not between the east-bound and west-bound track, but taking those two tracks, then, between them, or between the west-bound track and the cement works, is where the sidings come in?

A. There are sidings on the west side of the track, on the west side of the road.

Q. And on the west-bound track side?

A. Yes.

Q. In other words, they are not between the east-bound track and the canal, are they?

A. There is a siding east, on the east side of the road, at that point.

THE COURT: You are getting things confused. You are running your tracks east and west, so that you will have to give us the right angle there as north and south. Of course, by the compass, I suppose you are right, but designate it the other way, because we have agreed to call the tracks east and west.

THE WITNESS: At the farther end of the yard there is no siding on the side of the east-bound track, but down here at this cross-over there is a siding on the east.

By THE COURT:

Q. Alongside of the west-bound?

A. It is alongside, on the side of the east-bound main track.

Q. That would be south of the track, would it not?

A. The tracks run east and west, and that would be on the south side of the track.

Q. Is that the cement crossing, the crossing from the cement works, or the brick works, or whatever they call it?

A. That would be on the north side.

By Mr. Koons:

Q. The cement works are on the east side of the east-bound track, to your left, as you go eastward, on your east-bound track, the cement works are to the left?

A. Yes, sir, I believe so.

Q. And there is where the sidings are, with the exception of this one, the sidings that come into this cross-over, they are on that side, are they not?

A. There are sidings on that side.

Q. Most of them are over there, are they not?

A. I believe so.

Q. All of them except one, are they not, or does not your plan show?

A. Our plan does not show the sidings in the cement works, but there is practically only one—

Q. That is all right.

Re-direct-examination.

By Mr. Dickson:

Q. How many cross-overs from the west-bound main track to the east-bound main track are there between that west end of the yard and Siegfried Station?

A. There is only one.

Q. And that is the one which you spoke of as being between the two signals, 962 and 952?

A. Yes, sir.

Q. So that I get this clear, when you gave me the distance, starting with signal 972 at the west, what is the distance from there to the yard limits?

A. It is 3,229 feet.

Q. Then from the yard limits to 962 is that 3,062 feet?

A. From the yard limits to 962, that is 2,637 feet.

Q. That is 2637 feet?

A. Yes, sir.

Q. And then from signal 962 to the cross-over is how far? Is that 3,062?

A. That is 3,062 feet.

Q. Then from the cross-over to signal 952?

A. 1417 feet.

Q. And then the added distance from the cross-over down to the highway crossings, west 21st Street, brings up the total of 1985 feet?

A. That is right.

Peter Joseph O'Neill, having been duly sworn, was examined and testified as follows:

By Mr. Dickson:

Q. Where do you live?

A. East Mauch Chunk.

Q. You are employed by the Central Railroad of New Jersey?

A. Yes, sir.

Q. How long have you been in its service?

A. Ten years.

Q. What has been your position?

A. At the present time?

Q. What was your position in October, 1909?

A. Signal maintainer or electrical maintainer, as you put it.

Q. What did you have to do as signal maintainer? What did you have to do with the signals?

A. Keep them in repair, make all the repairs that are necessary, and see that everything is in proper working order.

Q. What was the last time you had anything to do with these signals 972 and 962 before October 9, 1909?

A. Well, do you mean if I made any inspection or any repairs?

Q. Yes, what did you do, and when did you last do it, before October 9.

A. October 7 we made an inspection from Treichler down to Catasaqua, of all the signals and apparatus connected with the signals—that is, the switch boxes, and everything connected with it.

Q. Did you cover signals 972 and 962?

A. Yes, sir.

Q. And 952?

A. Yes, sir.

Q. What was their condition when you finished your examination and your inspection of those signals?

A. I found them in proper working order, and left them the same way.

Q. When did you see these signals again after the accident?

A. Well, about thirty-five minutes after the accident happened at Siegfried we were there on the ground.

Q. Who was with you?

A. My battery man, Reed.

Q. When did Mr. Garragh get there?

A. It was about an hour and a half after the accident when he came there.

Q. And what did you and Mr. Garragh and Reed do?

A. Before Mr. Garragh came Reed and I went and made an examination and inspection—that is, we tested everything to see that our part was all right. Then when Mr. Garragh came there he said, "We will go and make another inspection." So we went up with him again afterwards, and we found the same conditions—that is, that they were working all right.

Q. How soon after the accident was it that you were able to work the signals?

A. When we got there about half an hour after the accident.

Q. The train was standing on the track?

A. Not when we got there.

Q. The train was not standing on the track when you got there?

A. No. We had one clear block on the east track.

Q. Which was that?

A. That was 962. That is, the home board was clear.

Q. You had one clear block, a home board?

A. Yes.

Q. Just explain to the jury what you mean by a home board?

A. The home board means the top part of the danger board—that is, the top part of the automatic signal is the home board, the red board. That was clear when I got there.

Q. That covers what block?

A. One block, the first block.

Q. One block?

A. Yes.

Q. The first block?

A. Yes.

Q. What do you call the other board?

A. The caution board, or distance board.

Q. That covers the second block?

A. That covers the second block.

Q. So that when you got there the block between 962 and 952 was clear?

A. Was clear.

Q. 952, down to the next signal, was where this wreckage was?

A. Right beyond, right beyond 952.

Q. So that when you got there you were able to test between 962 and 952 on this board?

A. Yes, sir, I was able to test.

Q. Then after the wreckage or the train was moved out of the other block between 952 and the next signal to the east, what did you do?

A. Made another test.

Q. And you tested which board then?

A. We tested both boards. We have got to test the two of them.

Q. What did you find?

A. We found them in proper working order, everything working as usual.

Q. Just describe to the jury how things work, when they work as usual, so that they will know what you mean.

A. Well, in this here case, when this train was coming east, when the boards were clear—that is, the two boards are down, hanging down, that was a clear block, and if there is a train in the block ahead, then the distance board or the caution board or the green board, whichever you want to term it, is outright, and if there is somebody in the block, or the block is occupied, or the switch is turned, then the two boards are up in that position (illustrating). That is what I mean by that. That is the best explanation I can make of it.

Q. What did you do in testing the signals to see if they would operate? How did you actuate or move them?

A. One man went back. I went back myself and re-turned the switches, to see if that would operate the boards properly.

Q. Were you able, from where you were when you were turning the switches, to see the signals?

A. I was in position to see them, yes. I went far enough back.

Q. When you turned the switch—for instance, when you opened the switch, from the west-bound main track to the cross-over, to the east-bound main track, what did the board do?

A. On the west track?

Q. Yes.

A. The west end of the cross-over?

Q. Yes.

A. That set the east-bound and west-bound board.

Q. And what did you say was set? What do you mean? What did the board do?

A. The board went to danger.

Q. It went up?

A. Yes.

Q. It had been hanging down before that time, had it?

A. Yes.

Q. When you turned that switch you say the board went up?

A. Yes.

Q. You were able to see that from where you were?

A. I was up at the east-bound signal, yes. He could watch the west-bound signal from where he was.

By The Court:

Q. What condition did you find them in when you went there thirty-five minutes after the accident happened?

A. I found them at caution, the green board.

By The Court:

Q. You say the home signal was clear?

A. Clear.

Q. And the other board?

A. Was at caution, because the train was beyond 952.

Q. Beyond 952?

A. Yes.

Q. But it was between 952 and the next signal?

A. Otherwise we could not have made the test.

Q. The next signal is at 942?

A. Northampton, yes.

Q. They go by 10's, do they, from 972, 962, 952?

A. If there are two in a mile, they jump two, and if there is one in each mile, they jump ten. If there are two in a mile they jump two, and come into the yards.

Q. The next signal east of 952 is No. what?

A. On which track?

Q. On the east-bound track.
A. 942.

THE COURT: It was at caution from 962 to 952?

MR. DICKSON: No, he said it was clear.

By MR. DICKSON:

Q. Between 962 and 952 the signal showed what? Between 962 and 952, that block, what did that signal show?
A. I don't understand that question.

MR. KOONS: Ask him what 962 showed.

By THE COURT:

Q. When you went there, at the time you inspected it.
A. When I got there at 962?
Q. Yes.
A. That was caution.
Q. Do not tell us that. Tell us how the arms were.

By MR. DICKSON:

Q. Caution means one board or two boards—
A. Green board up, yes.
Q. And that means that which block is occupied?
A. The 952 block.

THE COURT: Where to?

By MR. DICKSON:

Q. From 952—
A. To 942.
Q. But how about the block between 962 and 952?
A. It was clear. It was clear, certainly, when the home board was clear.

Cross-examination.

By MR. KOONS:

Q. You say that when you came there semaphore 962 showed caution?

A. Yes, sir.

Q. And that is the semaphore that is about three thousand feet west from the cross-over on the eastbound track?

A. Yes, sir.

Q. And that showed caution because just below the cross-over was a wreck?

A. No.

Q. Do you mean to say that you put out no signals for any trains that might be coming along on that track?

A. I did not say that.

Q. Then tell me what you mean.

A. I said just below 952 the wreck was. The cross-over is in between 962 and 952.

Q. I understand that quite well. How did the semaphores show at 952 when you came there?

A. They were at danger, red and green.

Q. Both of those semaphores were at danger, were they not?

A. Because one was occupied, obstructed with the wreck.

Q. It was obstructed with the wreck, precisely?

A. Yes.

Elmer E. Reed, having been duly sworn, was examined and testified as follows:

By Mr. Dickson:

Q. Where do you live?

A. Weissport.

Q. By what company are you employed?

A. The Central Railroad of New Jersey.

Q. How long have you been with them?

A. Six years.

Q. What is your position?

A. Battery man on the signals.

Q. Did you have this position in 1909?

A. Yes, sir.

Q. Please state what you did in October in connection with those signals before the accident?

A. Before the accident?

Q. Yes.

A. We worked on every signal from Treichler down to Catasauqua, inspected the signals through where this accident happened, and found them in working order.

Q. That is, you inspected 972 and 962?

A. Yes, sir.

Q. What did you do on October 9, the day of the accident?

A. We got down to Catasauqua on No. 8 that morning, and heard of the wreck, and went over the Valley, by No. 1, over the Valley that morning, to Cementon. We got off there and came on down, and we went up to the signals, and looked all over them, the switch boxes and signals, and found everything O. K. as far as we could see.

Q. What was the condition of 962 when you arrived?

A. 962?

Q. Yes.

A. Caution.

Q. That indicated what as to that block between 962 and 952?

A. 952 was danger.

Q. What did that caution of 962 signal indicate as to the block between 962 and 952?

A. That was clear.

Q. And between 952 and 942?

A. It was an obstruction there.

Q. And what were the conditions? What did signal 952 show?

A. 952?

Q. Yes.

A. Danger.

Q. After this train was removed from the track, what, if anything, did you do in the way of testing those signals?

A. We threw the switches from over the cross-overs, where this accident had happened, and found them working O. K., and from there up, 962 would go to danger.

Q. When you turned the switch?

A. Yes, sir.

Q. When you turned the switch at the other end of the cross-over, you say that had what effect upon 962?

A. Danger.

Q. And danger means both boards going up?

A. Yes, sir, both tracks, east and west.

Q. What did you personally do in the making of that test? Did you throw the switches, or did you watch the signals?

A. I threw the switches, I think. I am not positive of that. I think I did. Yes, while we were along there I did, but then Mr. Garragh came there later, our foreman.

Q. And then you made the test when he was there, did you?

A. Yes, sir, I made it.

Cross-examination.

By Mr. Koons:

Q. These semaphores we are speaking of, being 952, 962 and 972, are all automatic, are they not?

A. Yes, sir.

Q. Suppose a train going eastward on the east-bound track, comes to 972, and as it comes the semaphore is clear; as soon as the engine passes that semaphore, what does it do?

A. It goes danger.

Q. It goes danger?

A. Yes, sir.

Q. As it comes next to the semaphore that is clear, immediately the engine passes that, it shows danger, does it not?

A. Yes, sir.

Q. As it passes 952, if it is clear, after that it goes danger?

A. Yes.

Q. And remains that way for some time, does it not?

A. Yes, sir.

Q. That is for protection?

A. Two blocks before it clears. It was one block, then caution.

Q. That is to keep a space between the trains following each other on the same track?

A. Yes, sir.

ELMER ANTHONY, having been duly sworn, was examined and testified as follows:

By MR. DICKSON:

Q. Where do you live?

A. Warrenport.

Q. What is your business?

A. Working around horses in a livery stable.

Q. You are a livery stable man?

A. Yes, sir.

Q. Were you ever employed by the Central Railroad of New Jersey?

A. Yes, sir.

Q. Were you employed by them on October 9, 1909?

A. Yes, sir.

Q. What was your duty then?

A. I was loading coal up there at the engine.

Q. Loading coal.

A. Yes, sir.

Q. What did you see of this accident?

THE COURT: Where was he loading coal?

By MR. DICKSON:

Q. Where were you at the time of the accident?

A. At Siegfried, right at the crossing, at the gate shank.

Q. Right at the crossing?

A. At the gate shank.

Q. Which crossing? You mean the highway crossing?

A. Yes, sir.

Q. Is that the 21st Street crossing, just below the station?

A. I don't know what they call it.

Q. That is the crossing that runs across the railroad, just below the station?

A. Yes, sir.

Q. Where the gates are?

A. Yes.

Q. Just state what you saw?

A. Well, I saw two engines coming down there, and he blew for the crossing gate, the fireman on 514.

Q. The fireman on 514?

A. Yes.

Q. That is the little engine?

A. Yes.

Q. And he blew a whistle?

A. Yes, for the crossing.

Q. What was that engine doing, 514? Which way was it coming?

A. It was coming down.

Q. Coming down?

A. Yes, sir.

Q. You mean on the eastbound track?

A. Yes, sir.

Q. And which way was it facing, forward or backward?

A. Backwards.

Q. Backwards?

A. Yes, sir.

Q. Where was the other engine?

A. Right in back of it, facing.

Q. Facing it?

A. Yes, sir.

Q. That is, the pilots of the two engines were together?

A. Yes, sir; right against each other.

Q. What speed were they coming?

A. I could not just tell you. Around thirty miles an hour, I think; something like that, as far as I can tell. About thirty miles an hour.

Q. What did you see of the engineer of 184?

A. He was standing out on the front foot board.

Q. The engineer of 184?

A. Yes.

Q. He was out on the front foot board?

A. Yes.

Q. You mean in front of the cab?

A. Yes, sir; outside of the cab.

Q. What was he doing there? That is, on the right-hand side of the engine?

A. On the right-hand side.

Q. And he was out in front of the cab?

A. Yes, sir.

Q. On the running board?

A. Yes, sir.

Q. Was he standing or sitting, or what was he doing?

A. He was standing up.

Q. What was he holding on to?

A. He was holding on to that railing that goes along the engine there.

Q. That rail that goes along opposite the walk there?

A. Yes.

Q. Which way was he looking?

A. He was looking down at the pilot.

Q. Looking down at the pilot in front of him?

A. Yes.

Q. Did he say anything?

A. No; not that I know of. I did not hear him say anything.

Q. What did he do? What did you see him do?

A. I saw him jump off then, after the other engine tore away from him.

Q. After the other engine separated?

A. Yes.

Q. When the other engine separated, what did it do? Did it go on down the track ahead of him?

A. Yes. The engine jumped the track, right at the frog.

Q. The engine that he was on?

A. Yes, sir.

Q. And what did his engine do, then, when she jumped the track?

A. She went over the cross-over. She was off the track then.

Q. What did she do?

A. She tore loose of the cars, and that is the only time I heard there was any air at all, any screeching going on. There was no screeching going on as long as the engine was on, that you could hear, you know.

Q. When the engine went off the track, then the brakes went on?

A. Yes, after they broke loose everything went upside-down.

Q. When the engine went off the track, what happened to the engine?

A. She was off of the track then, and she went over the other tracks, you know, over the cross-over tracks.

Q. What happened to her? Did she go along on her wheels or fall over on her side?

A. She was on her side, after she stopped, when she was laying, after everything was over.

Q. You say you saw the engineer jump?

A. Yes, sir.

Q. And then what happened to him?

A. He got killed. That is sure.

Q. Where did he land?

A. About three steps above the shed, the coal shed there at Siegfried.

Q. He landed on the ground, and did he fall or what happened to him when he landed?

A. I could not see any more then. The cars started to pile up, and he got under the cars.

Q. The cars from behind?

A. Yes.

Q. Did you see anybody else on the engine?

A. No, sir.

Q. What kind of a day was this? What sort of weather was it?

A. Foggy.

Q. When you got down there to these cars, where did you find the engineer?

A. I found him under the cars, and under the trucks and on the ground, stones and everything else were on top of him.

Cross-examination.

By Mr. Koons:

Q. You say when you saw these two engines coming along they were going about thirty miles an hour?

A. Yes, sir; it was something like that.

Q. Did you ever have any experience in working on trains, such as engineer, or fireman?

A. No.

Q. Brakeman?

A. Brakeman.

Q. How long?

A. A year.

Q. How long ago?

A. That was just a year ago.

Q. That is since the accident?

A. Yes.

Q. Had you had any experience as brakeman prior to this accident?

A. No.

Q. Then your statement as to thirty miles an hour is your best guess, is it not?

A. I think so. As far as I can say, you know.

Q. Which side of the east-bound track were you standing on?

A. On the right-hand side.

Q. That is towards the canal or river?

A. Yes, towards the river.

Q. There is a bridge there, is there not?

A. Yes, sir.

Q. There is a road crossing these tracks, and it goes over the Lehigh—goes over the canal and over the Lehigh?

A. Yes.

Q. You were standing on the bridge side?

A. Yes, on the bridge side.

Q. How far away from the crossing were you?

A. About two or three steps.

Q. Two or three steps?

A. Yes.

Q. And where was it that the engines broke loose from each other below the crossing?

A. Right below the crossing at the frog.

Q. How far below the crossing?

A. I could not just tell you.

Q. About?

A. About a rail or so long, I guess.

Q. About a rail or so long?

A. Yes, as far as I can say.

Q. You saw Mr. Young on the foot board right outside of the cab?

A. Yes, sir.

Q. Of his engine?

A. Yes, sir.

Q. And do you know what he was doing?

A. He was standing there looking.

Q. Hanging on there looking?

A. Yes, he was holding on, standing looking down at the pilot.

Q. And he stayed there until the other engine broke loose?

A. Yes, sir.

Q. And until his engine left the tracks?

A. Yes, sir. He jumped.

Q. After his engine left the tracks?

A. Yes. He jumped on the other tracks.

Q. And just as he jumped the cars piled up over him?

A. Yes.

Q. You did not see Mr. Young up at the collision, at the cross-over, did you? You did not see him there? You did not see the collision up at the cross-over, when the two engines first came together?

A. No.

Q. You only saw it down here at the crossing?

A. Yes, down below.

William H. Higgins, having been duly sworn, was examined and testified as follows:

By Mr. Dickson:

Q. Where do you live?

A. Jersey City.

Q. And what is your business?

A. Signal engineer of the Central Railroad of New Jersey.

Q. You are signal engineer of the Central Railroad of New Jersey?

A. Yes.

Q. How long have you held that position?

A. About twelve years—that is, holding that posi-

tion under a different title, supervisor and signal engineer.

Q. What do you have to do with the arrangement and placing of signals?

A. We arrange the location of the signals, the installation and maintenance of the signals.

Q. These signals that we have been talking about along the line of this road, 972, 962, 952, and so on, are a part of what system?

A. The automatic block system.

Q. Won't you please explain to the jury the working of that system, how it works and what is the purpose of it?

A. Those block systems or signals are known as a series of blocks, and they are operated automatically by the presence of a train. They consist of a home and distance signal. The home is in the top position, and the distance, green board, in the lower position, on the mast. The normal position of these signals is clear, that is, they are in the diagonal position of about seventy degrees below horizontal, and the presence of a train in a block, after it passes a signal, puts both signals to the horizontal position—that is, the home and distance both, the stop position. When the train passes into the next block, the rear end passes the next signal in advance, and the home signal of that block that has just been left will come to the clear position. Then the second train coming to the block will find a caution signal against him to the clear block signal, meaning that the immediate block they are going to enter is clear, not obstructed, but the signal in the advance block is danger. When the first train passes out of that second block in advance, then the home and distance board on the first block entered will both assume a clear position, meaning that the first block is clear, that he is going to enter, and the signal for the second block is clear. Those signals are affected by the presence of a train in a block, or by the opening of

a switch in the block. Any switch that leads to that track or on the track will be governed by the signal. They are also affected by the presence of a car or an engine on any side track that may foul the clearance distance of the track protected. They are also affected by disarrangement of circuits—that is, there must be a current, both on the operating circuit and on the track circuit to operate the signals. If those are disarranged, of course the signals will assume a stop position. That is, a train operating those signals, and finding that stop, it must come to a full stop, and then it may pass into a block, under caution, prepared to find the rear end of another train or an open switch or something obstructing the block they enter.

Q. What considerations govern the distance at which you place these automatic block signals, one from another, along the line of the road?

A. They are spaced about on an average of a mile up in that vicinity, and they are spaced in accordance to the view, principally, that can be had of them, and the grades and curves. All have a tendency to change the location of the signals.

Q. But on the average they run about a mile apart?

A. About a mile apart, as near as we can get them, with the conditions on the ground.

Q. So that if there was a train in each block, you could only have one train to a mile on your road running in the same direction?

A. About a mile, yes.

Q. And each one of those trains, then, would be running under caution signals?

A. Yes, sir; the first one, of course—

Q. Would be running under danger signals?

A. Yes. The second one would be under caution.

Q. With reference to what trains do you place these signals upon the track, along the side of the track?

A. We place those signals to give a good braking distance for scheduled trains.

Q. To give a good braking distance for scheduled trains?

A. Yes.

Q. What do you mean by a good braking distance? Can not you illustrate that by this particular case that we have got here?

A. Well, the location of signal 962, which is the signal in question, as near as I can understand, is located about three thousand feet from the cross-over switch where the accident occurred. We consider three thousand feet a very good braking distance, particularly for a day like this in question, when it was foggy, and the signal might not have been seen until the man was close to it. If he would have three thousand feet and would bring his train to a stop before he reached the point where he was apt to get into trouble, he would have a braking distance of three thousand feet.

Q. By braking distance you mean the distance in which a man can apply his brakes sufficient to bring his train to a stop?

A. Yes.

Q. Without any unusual or unnecessary or forcible application?

A. Yes.

Q. And signal 962 was then placed, as you say, at that distance, with a view to governing the motion of the train, coming on the eastbound track?

A. On the eastbound track, and also on account of the view that can be had of the signal ahead of it. Right ahead of that block between 962 and 972 there is quite a curve. Then we want the engineer to get a good view of the signal as he rounds the curve, probably twenty-five hundred feet, something like that, that he can get a straight view of the signal. That was the principal object of lowering it at that point.

Q. You say this is to give the scheduled trains a proper braking distance?

A. Yes.

Q. What is the purpose of those signals in connection with extra trains?

A. Those particular signals, the virtue of the signals is taken away by the yard limit rules. It does not amount to anything as a clear signal. Of course, if it is in a stop position, we compel the trains to stop there.

Q. How do you mean the virtue is taken away within the yard limit rules? Is that so as to scheduled trains?

A. No; for extra trains.

Q. For extra trains?

A. Yes.

Q. Just explain that to the jury so that they can understand it.

A. Extra trains have no right to run at a speed that they cannot be prepared to stop, and a clear signal does not tell them they have that right. They are apt to find something in the block after they pass a clear signal.

Q. The clear signal tells them at the time they approach the signal—

A. At the time they approach the signal it is clear, but it does not say it will be clear one second or one minute or one hour after that. They cannot tell what conditions they are apt to find. In other words, the conditions are apt to change just as they pass it, or in their face.

Q. Within yard limits?

A. Within yard limits, yes, sir.

Q. In the case of a scheduled train, how does it work?

A. A scheduled train, the yard engines would have no right on the track, under schedule time. If they did go on the track they would have to protect themselves with a flag.

Q. So that the signal being clear gives a scheduled train the right of way?

A. Gives a scheduled train the right through that yard, the same as any other point, because they have yard rights.

Q. Suppose a scheduled train had been coming along, and this switch were turned, and then the—

THE COURT: I am afraid we will get confused by bringing in supposititious cases.

(Question withdrawn.)

By MR. DICKSON:

Q. Do I understand that it is your judgment, then, that three thousand feet gives a proper braking distance before you reach this cross-over?

A. The space between the end of the curve and the cross-over switch is pretty near equal. The signal is placed a pretty near equal distance between the two of them, for both purposes—that is, to give a good view of it for approaching trains, and also a protection of the switches through the yard.

Cross-examination.

By MR. KOONS:

Q. Now, I understand that these signals—for instance, 962, the one immediately west of the cross-over, on the eastbound track, is about three thousand feet—

A. Yes.

Q. As Mr. Young's train is going along there, if that signal showed stop, then, of course, he had to obey it?

A. He had to obey it, yes.

Q. But if it showed clear, he did not?

A. No, sir.

Q. Will you show me in the book of rules of your company anything to give Mr. Young any indication that there was such a designation between his train and a scheduled train?

A. Rule 107.

Q. Rule 107?

A. Yes.

Q. Will you kindly read that rule to us?

A. I want to get my glasses.

Q. If you have so much trouble, if you do not object, I will read it for you?

A. You can read it.

Q. "107. Yard limits will be indicated by yard limit boards; within these limits yard engines may occupy main tracks, protecting themselves against scheduled trains. Extra trains must run through yards under control, looking out for yard engines and other extras." That is the rule you refer to?

A. Yes, sir. I also refer to rule 502.

Q. Let us get through with this one.

MR. DICKSON: You asked him with reference to the book of rules.

MR. KOONS: And he answered rule 107.

MR. DICKSON: He said he also refers to another rule.

THE COURT: He is taking another rule in connection with it. Let him state it.

THE WITNESS: Rule 502.

By MR. DICKSON:

Q. Is that on page 71?

A. Page 71. That reinforces rule 107.

By MR. KOONS:

Q. Will you read that one to me?

A. (Reading) "502. Block signals control the use of the blocks, but, unless otherwise provided, do not affect the movements of trains under the time-table or train rules; nor dispense with the use or the observance of other signals whenever and wherever they may be required."

Q. Yes. All right. Are you sure you have all the rules on the subject?

A. I think that is about all; those two rules are all that I know of that refer to the yard limits.

Q. Those are the only two rules?

A. Yes.

Q. You are positive of that?

A. Yes, that I know of.

Q. In rule 107 we read that "Extra trains must run through yards under control, looking out for yard engines and other extras". Do you mean to say by that that an extra train, like Mr. Young's, had to stop every few minutes as he came through this yard?

A. It had to come there prepared to stop.

Q. For what?

A. For anything that he could find, any obstructions.

Q. Anything he had notice of?

A. Yes, sir; anything that he could see.

Q. Anything that he could see?

A. Yes, sir; that would interfere with his passage.

Q. Anything that he could see or that would interfere with his passage?

A. Yes.

Q. But he was not to stop until he did see anything that interfered with his passage, would he?

A. No. He could be prepared to stop. That is all.

Q. He had a live stock train?

A. He had the right to go through the yard, if he did not see anything that obstructed his view.

Q. He is expected to make good time, is he not?

(Objected to.)

A. Not at that point. Under those conditions he was not supposed to make good time. In foggy weather he had to be prepared to stop in a very short distance.

Q. Will you show me anywhere in that rule where it says these signals do not apply to a train like Mr. Young's?

A. The yard limit rules must be obeyed, and for

that reason the signal cannot give them a perfect right through there.

Q. That is your interpretation, then?

A. Yes, sir.

Q. You are unable to find it in express language in the book?

A. That is my interpretation.

Q. That is your interpretation?

A. Yes.

Q. That is your interpretation. Referring to rule 502, I believe it says, "Block signals control the use of the blocks, but, unless otherwise provided, do not affect the movements of trains under the time-table or train rules"?

A. Yes.

Q. Was this a time-table train of Mr. Young's?

A. No, sir, it was a special train.

Q. A special. How does that come under that rule at all, then?

A. That is the reason it is not governed by that schedule, the fact that it has no time.

Q. But does not the rule say that block signals do not affect the movements of trains under the time-table or train rules? Is not that the language?

A. Do not affect the—

Q. I will read it again: "Block signals control the use of the blocks, but, unless otherwise provided, do not affect the movements of trains under the time-table or train rules". What kind do they affect, or don't you understand the rule yourself?

A. They affect trains.

Q. What kind of trains?

A. They affect all trains, except in the yard limits. In the yard limits, the train must be governed by those very rules, or bulletins, any order that may be issued.

Q. Any order?

A. For instance, if a train, or say if a block should become bad, that is governed by a signal. I interpret

this rule to mean that if there is another signal placed in there, the train crew must recognize that other signal. If there is a rule issued or a bulletin, a slow order issued, they must recognize that, they must obey it.

Q. If there is no such rule issued, or no such bulletin, or no other signals, what else have they to go, then, by, but the block signal?

A. No, then they have a perfect right to go by, the schedule trains, outside the yard limits.

Q. Does not that apply also in the yard limits, if they have no other rules?

A. No, because this rule is to govern. This rule 107 says they must be prepared to stop. For that reason, they have no right to go through there, only under control.

Q. Suppose they are going under control, are not they entitled to some warning of other trains on other tracks?

A. No, sir.

Q. They simply go ahead?

A. They simply go ahead.

Q. In foggy weather and clear weather, and all kinds?

A. To be prepared to stop if anything comes, any obstruction in their way.

Q. You have no rule, then, to protect them in foggy weather, or anything of that kind?

A. No, sir.

Re-direct-examination.

By Mr. Dickson:

Q. You said that means when running under control, that they must be prepared to stop in time to avoid hitting anything they see in front of them?

A. Yes, sir.

Q. In foggy weather, or where they cannot see so far as they can in clear weather, how does that rule 107 affect them as to speed?

A. They must run that much slower. They must be prepared to stop under all conditions, in range of vision.

Q. But if the range of vision under that 107 rule is one to two hundred feet, within what space must they be able to stop?

A. Within one or two hundred feet.

Q. Mr. Koons asked you if this was your interpretation of the rules. Do you know the company's interpretation of the rules?

(Objected to.)

A. No, I don't know how the—

MR. KOONS: That is objected to. I do not care how the company interprets the rules. I want to know how they instructed their men.

MR. DICKSON: I will put the instructor on. If this man knows what interpretation is put upon them, I think I have the right to ask him.

By MR. DICKSON:

Q. Do you know what the company's interpretation of these rules is?

(Objected to.)

A. They are the same as mine, as far as I can understand.

MR. KOONS: I object to that question.

EDWARD E. CURWIN, having been duly sworn, was examined and testified as follows:

By MR. DICKSON:

Q. Where do you live?

A. Elizabeth, New Jersey.

Q. What is your business?

A. Division superintendent, Central Railroad.

Q. Division superintendent of the Central Railroad of New Jersey?

A. Yes.

Q. How long have you held that position?

A. Nearly ten years.

Q. And as division superintendent what do you have to do with the operating of trains?

A. I have all to do with the operation of trains.

Q. You are the boss of everything. Is that what you mean?

A. Yes.

Q. What rule, in your understanding of the rules of the company, governs the question of operation through yard limits?

A. Rule 107.

Q. To what trains does that rule apply?

A. To extra trains.

Q. What kind of a train was Young running?

A. An extra train.

Q. What sort of work was engine 514 doing at at that time?

A. Yard work.

Q. Which had the right of way through that yard or on that track?

A. Engine 514, the yard engine.

Q. On what do you base that?

A. Rule 107.

Q. Is that your own interpretation of it, or is that the company's interpretation?

A. That is the company's interpretation, and that is the standard interpretation of all railroads.

Q. All railroads?

A. All railroads that use that rule.

Q. Then rule 107 is not, then, peculiar to your company? Rule 107, then, is not peculiar to your company?

A. No.

Q. What is it based on?

A. The American Railway Association rules.

Q. Rules of the American Railway Association?

A. Yes.

Q. (Book shown witness.) Is this the standard code of American Railway Association rules?

A. I will say that it is.

Q. Are you familiar with the rules?

A. Yes, sir.

Q. I call your attention to rule 93, page 26, and ask you to read that to the jury.

A. "Within yard limits"—

MR. KOONS: I want to ask a question first.

By MR. KOONS:

Q. Are your men supplied with that book, your engineers?

A. Not with this book.

MR. KOONS: Then I object to any reference to it whatever.

MR. DICKSON: I think I have the right to show the rule this company uses, and which is governing the operation of these trains upon this track; it is a rule which is adopted in accordance with the Standard Railway Association Rules of the United States.

THE COURT: I do not think you can offer the rule. He has given his testimony that this rule was not peculiar to your company. It seems to me that covers it, without going into the rules of the American Railway Association. You see, it opens that door. He has already testified it is not peculiar to your company, as to yard limits.

MR. DICKSON: If your Honor feels that that point has been covered, I will not press that question any further.

By MR. DICKSON:

Q. The plaintiff's counsel yesterday read to the

jury certain of the rules of the defendant company. Have you a copy of the company's rules there?

A. I have.

Q. On page 19 he read rule 91-a. I call your attention to that rule, and ask you to point out to the jury the applicability of the rule to this present case.

A. It is not applicable. It is the telegraph block signal rule, used in a territory that is not equipped with automatic block signals.

Q. It has nothing to do, then, with this situation?

A. No.

Q. On page 21 he referred to rule 99, "When a train stops or is delayed, under circumstances in which it may be overtaken by another train" etc. How does that rule apply to the action of the engine of 514?

A. It does not apply to that in yard limits, unless he was encroaching on the time of a scheduled train, where they must protect themselves.

Q. Rule 99-A, on the same page, "On double track when a train crosses over to, or obstructs the other track, unless otherwise provided, it must first be protected as prescribed by rule 99". How does that rule apply to 514?

A. That applies to all trains, but does not include yard engines engaged in yard work within yard limits.

Q. Does it apply to engine 514?

A. It does not within yard limits, no, sir.

Q. On page 53 he referred to rule 301. That is the rule in reference to home and advance signals, stating the position or color of the signals, and he read the part which says, "Signal. Color. White. Block is clear. Proceed. Name. Clear signal." He did not read the part below there, "Where the semaphore is used, the governing arm is displayed to the right of the signal mast as seen from an approaching train, and the indications are given by positions", as described by the book here. That is one of the system of rules governing what?

A. The telegraph block system.

Q. There is the same rule, is there not, in the automatic block signal system?

A. Yes.

Q. He simply read from the wrong place in the book, and in the automatic block signal system, the rule being the same as this one, that is the rule in reference to signal 962, is it?

A. It is.

Q. Which we have just had explained to us by Mr. Higgins?

A. Yes, sir.

Q. On page 59, rule 326, "To permit a train to cross over or return the signal man must examine the block record", and so forth, what has that to do with this case?

A. That is the telegraph block signal system again. It has nothing to do with this case.

Q. What is the signal man who is referred to there, that he is to examine the record, and allow the train to enter the block, and so on?

A. He might be the towerman in charge of the interlocking plant of one or the other. He might be the block operator at some block station.

Q. Would he be connected with the train crew in any way?

A. No.

Q. Or the switching crew?

A. No.

Q. He is an independent person who operates the block?

A. Yes.

Q. Like these towers we see where men pull the handles and levers?

A. That is right.

Q. That is a different system altogether?

A. Yes, sir.

Q. From what you have at this point?

A. Yes, sir.

Q. He also read a rule on page 62, rule No. 363, "An engine man holding a caution card must deliver it to the signal man at the next block station."

MR. KOONS: No, I do not think so.

MR. DICKSON: I made a note of it. I may be mistaken. You will admit that has nothing to do with it?

MR. KOONS: Yes.

By MR. DICKSON:

Q. He also read rule 366 on page 63, "When it is necessary for a train to cross over, the conductor, before crossing or returning, must notify the signal man and obtain permission to do so".

A. That has reference to crossing over at an interlocking plant.

Q. Was this an interlocking plant here?

A. No, sir.

Q. On page 74 he read some portion of the rules on that page. I do not seem to have a note of them. Yes, "The interlocking of signals with switches, locks, railroad crossings or drawbridges, so that a clear signal cannot be given unless the route to be used is clear, and stop signals displayed for all conflicting routes". What has that got to do with this case?

A. Absolutely nothing.

Q. That is under the interlocking system?

A. Yes, sir.

Q. You say this is not the interlocking system?

A. No, no interlocking system at Siegfried.

Q. It is not?

A. No.

Q. He also read on page 74: "9, The apparatus so constructed that the failure of any part directly controlling a switch or lock will prevent the display of the clear signal". What has that got to do with this?

A. Absolutely nothing.

Q. Is that also the interlocking system?

A. Yes, sir.

Q. He also read rule 663, on page 81, as follows: "Engine men and train men must not accept clear hand signals as against fixed signals until they are fully informed of the situation and know that they are protected. Where fixed signals are in operation train men must not give clear hand signals against them". What has that got to do with it?

A. That covers the movement through interlocking plants.

Q. On page 102, rule 997, he said: "While engine is moving they must keep a constant lookout when not engaged in firing, and be on watch if the engine man is obliged to look away from the track in front, until he can resume his lookout; they will give instant notice to the engine man of any signal or danger or obstructions, or if there is any reason to believe the train has parted or has struck any person or object on the track". How does that rule apply here?

A. That rule is general practice. That is what we require from the firemen.

Q. That is general practice?

A. Yes.

Q. You have heard the testimony of the fireman, that he was in the tank, engaged at the fire?

A. Yes.

Q. You have heard the testimony that he looked ahead?

A. Yes.

Q. And there was no time to give warning?

A. Yes.

Q. He also read rule 998 on page 102, "They must carefully notice, as far as practicable, the position and indication of all fixed signals. They will keep a sharp lookout also for signals carried by other trains, and will keep in mind all orders and notices regarding the movement of trains, so as to be prepared to correct any

oversight or mistake if there should be any occasion for so doing. They will see all train orders received, and will read aloud such orders to engine men." That is a general rule governing the duty of the firemen, is it?

A. Yes.

Q. I call your attention to the book of rules and definitions on page 7. You have heard the testimony of the conductor of engine 514?

A. Yes.

Q. That his engine did not have any markers?

A. Yes.

Q. Under the definition of "train", do I understand that that was a yard engine, or was it a train?

A. It was a yard engine.

Q. Do you know then what it was?

A. I know it was a yard engine.

Q. I call your attention to a definition on page 8, "Time-Table". That applies to what trains?

A. The time table is the authority for the movement of scheduled trains.

Q. For scheduled trains?

A. Yes, sir.

Q. You say this was a yard engine under the definition on page nine, do you?

A. I do.

Q. Will you please read that definition of "yard engine"?

A. (Reading) "Yard Engine. An engine assigned to yard service, and work within yard limits".

By The Court:

Q. Which rule?

A. Page nine, a definition.

By Mr. Dickson:

Q. You have heard the testimony that no whistle was blown by Engineman Young, as he came through this yard, either before or after the collision with en-

gine 514. Is there any rule in the book relating to his duty to whistle?

A. There is.

Q. What one is that?

A. I will try and locate it. I will try and find it in a moment.

Q. Look at page 17, and see if you find a rule there.

A. Rule 31.

Q. Please read the rule.

A. (Reading) "31. The engine-bell must be rung on approaching every public road crossing at grade, and until it is passed; and the whistle must be sounded at all whistling posts."

Q. How does that rule apply to the duty of whistling in this case?

A. Under that rule Mr. Young should have sounded the whistle at the whistling board.

Q. Where is the whistling board?

A. About eight hundred feet west from the cross-over where the collision occurred.

Q. About eight hundred feet west?

A. Yes.

Q. Of the cross-over?

A. Yes.

Q. There is a whistling post?

A. Yes.

THE COURT: That would be after he passed 962?

MR. DICKSON: Yes.

THE WITNESS: Yes, sir.

By MR. DICKSON:

Q. Let us suppose at the time he came along, and as he passed 962, 962 at that time was clear, and when he got in the block 962 had gone to danger. Do you still say that, having entered the block under those circumstances, it was his duty to whistle at this whistling post?

A. It was.

Q. What rule or rules in your opinion governed the operation of engine 514 and 184?

A. Rule 107 at that point.

Q. At that point?

A. Yes.

Q. And why is that?

A. Because of the defined yard limits. Under rule 107 engine 514 could use the main track without flag protection—that is, keeping clear of scheduled trains. Extra trains must pass through the yard limits under control, looking out for yard engines and other extras. Being under control, they can enter the yard limits, prepared to stop within seeing distance.

Q. And if it is foggy weather?

A. They must be governed by that condition.

Q. Does that affect, then, the rate of speed at which they can run their engine?

A. It does.

Q. How does it affect it?

A. If the view was short they would have necessarily have had to run slower, because they would have a shorter distance to stop.

Q. You have heard the testimony that they had been delayed earlier upon the road. Were you present in court yesterday?

A. Yes, sir.

Q. You have heard the testimony that was given in this case?

A. Yes.

Q. You have heard the testimony that this train had been delayed at an earlier part of its trip. I now call your attention to rule 976 on page 98, and ask you to read that to the jury, and to state how that applies to this case.

A. Page 98?

Q. Page 98, rule 976.

A. (Reading) "976. During foggy or stormy weather, if delayed on any part of the road, they must not attempt to make up time; and will take extraordinary precautions, both at switches and at all places where right to proceed depends upon signals."

Q. And that is one of the rules relating to the duties of what class of employees? Will you look back to page 95?

A. To engine men.

Q. Did that govern Engineman Young?

A. Yes.

Q. Did that govern 514?

A. No.

Q. Why not?

A. Because they were in the yard service, working within yard limits. They were not a road engine.

Cross-examination.

By Mr. Koons:

Q. Rule 976 says, "If delayed on any part of the road, they must not attempt to make up time". Do you say Mr. Young was attempting to make up time?

A. I do not.

Q. The rule says, "and will take extraordinary precautions, both at switches and at all places where right to proceed depends on signals". Did his right to proceed, when he came into this yard, where these block signals were, depend upon these signals?

A. His right to proceed when he came where these block signals were, depended on rule 107.

Q. I will ask you to please answer my question yes or no. This rule says, "And will take extraordinary precautions, both at switches and at all places where right to proceed depends upon signals". Was this the yard limit, where these semaphores are, 962 and 972, and the place where Mr. Young's right to proceed depends upon signals?

A. Yes.

Q. It was such a place?

A. It was such a place.

Q. His right to proceed, then, in this yard, depended upon signals?

A. Not wholly on signals. His right to proceed in that yard depended on rule 107. Those signals meant nothing to him.

Q. Those signals meant nothing to him?

A. Absolutely nothing.

Q. Nothing to him?

A. No.

Q. So that this rule 976 has no application whatever to his conduct?

A. If the signal was danger when he came there, he would have to recognize it by stopping.

Q. Did not you just say it had no application whatever to him?

A. Rule 107—

Q. Answer the question. Did not you just say this rule had no application to him?

A. Not the way you wish to put it.

Q. Is not that a fair question? I will ask you again, whether you did not just say that his right to proceed did not depend upon those signals. You said it did not. Now you say if it was danger he had to stop?

A. Yes.

Q. You want to qualify what you said before?

A. Yes.

Q. You were mistaken?

A. I was not mistaken. I stand on what I said.

Q. If his right to proceed did not depend upon signals, will you tell us how this rule 976 could possibly apply to Mr. Young's conduct this morning?

A. It applied to Mr. Young before he reached those yard limits all the way from Haucks to Siegfried.

Q. Before he reached the yard limits?

A. Yes.

Q. When he got to the yard limits that rule was abrogated?

A. When he got to the yard limits he was governed by rule 107.

Q. This rule had no application?

A. It had application to this extent, that he had to stop, or to recognize it by stopping. All trains must do that.

Q. But the rule does not say that, does it? Will you show me in that rule where it says that?

A. There are rules that govern that.

Q. Will you show me in that rule where it says that?

A. No, it does not say that.

Q. Will you show me any other rule which does show that?

THE COURT: It is a matter of common knowledge that at all danger signals trains must stop, of course.

MR. KOONS: I want to get his full and complete knowledge of the rules, and just what his interpretations are. They seem to be elastic, and I want to find out just what his interpretations are.

By MR. KOONS:

Q. So that, after all, those signals or semaphores in this yard limit, have some use for an engine like Mr. Young's?

A. They did.

Q. And if they point stop, he must stop?

A. Yes.

Q. And if they do not point stop, what do they show?

A. They point clear.

Q. And that means that he need not stop, does it not?

A. It means that he can move under rule 107.

Q. He can move on under rule 107. He cannot go

through there at fifty or sixty miles an hour and keep his eyes shut?

A. No.

Q. So that those rules have some application, even in the yard limit, to a train like Mr. Young's?

A. Yes.

Q. The latter part of rule 107 says, "Extra trains must run through yards under control, looking out for yard engines and other extras". Will you tell us how he was to look out for yard engines and other extras?

A. They must move at a rate of speed which they can stop within a distance they can see ahead of them.

Q. In a distance they can see ahead of them?

A. Yes. In other words, they must run so that they can stop short for any obstruction that there may be on the track.

Q. That is your interpretation of that rule?

A. That is the company's interpretation of the rule. That is the standard interpretation of the rule.

Q. That is the company's interpretation of the rule. Were you in Court yesterday when Mr. Graver, the conductor of the shifting train, was testifying?

A. I was.

Q. Did you hear him say that he was just handed his book of rules, and he never received any instructions?

A. No.

Q. You did not hear that?

A. No.

Q. Did you hear his testimony at all?

A. I heard part of it.

Q. Do you deny he said that?

A. I do not deny he said that. Some things I did not hear.

Q. You did not hear that?

A. I did not hear that, no, sir.

Q. Do I understand you to say that there was a whistling post on the east-bound track, west of this cross-over?

A. Yes, sir.

Q. Of this cross-over where the accident happened?

A. Yes, sir.

Q. Or are not you confusing it with the cross-over farther down?

A. No.

Q. Did you ever see that whistling post, or have you ever seen it?

A. Yes, sir, I have seen it.

Q. When?

A. A few days ago.

Q. Two days ago?

A. A few days ago.

Q. Three days ago?

A. Make it last Friday or Saturday.

Q. It was there at that time?

A. Yes.

Q. Whether there was one there at the time of the accident, or before, you do not know of your own knowledge?

A. I do, yes.

Q. Did you see it?

A. Yes.

Q. When?

A. At the time of the accident, on the day the accident occurred.

Q. On the day the accident occurred?

A. Yes.

Q. What time did you get there?

A. Around about noon somewhere, between eleven and twelve o'clock.

Q. And just how far west of the cross-over of this east-bound track is this whistling post?

A. Approximately eight hundred feet.

Q. About eight hundred feet, before you come to the cross-over on the east-bound track?

A. Yes.

Q. And on which side of the east-bound track is the whistling post?

A. On the right side.

Q. And how close to the track?

A. I did not measure the distance. I would say roughly—

Q. About?

A. Ten or twelve feet.

Q. How high was it?

A. It is the standard height about, perhaps six feet in length.

Q. And what is on it, if anything?

A. The letter "W".

Q. Facing which way?

A. Facing the west.

Q. Your attention has been called to rule 31, as follows: "The engine bell must be rung on approaching every public road crossing at grade." That is before you come to a road crossing. That is not of cross-overs?

A. No.

Q. (Continuing) "and until it is passed; and the whistle must be sounded at all whistling posts."

A. Yes.

Q. That is, if there was a whistling post east or west of this cross-over, then it was Mr. Young's duty to sound it?

A. It was his duty to sound the whistle.

Q. And if there was none there, it was not his duty to sound it?

A. There was one there.

Q. But if there was none there?

A. If there was none there he would not whistle, no, sir.

Q. You say this was a yard engine. Do you know what this yard engine was doing this day?

A. It was doing general yard work at that place. It was doing general yard work at Siegfried.

Q. How do you know?

A. Because it was working there.

Q. Because it was working there?

A. Yes.

Q. If you saw a passenger train coming out of a siding and getting on to the main track, would you say it was a yard engine?

A. No.

Q. Had you seen this yard engine before the accident?

A. Many times.

Q. Had you seen it this day?

A. No.

Q. This engine had varied duties to perform, had it not?

A. It did. The crew did and the engine.

Q. This engine?

A. Yes.

Q. They used it, among other purposes, to carry workmen back and forth on the main line, did they not?

A. Yes.

Q. Do you know, as a matter of fact, that on this day they were through with the yard work, and were out on the main track, going back to Catasauqua, or some point on the line?

A. I do not.

Q. Do you deny it?

A. I don't know that they were through with the yard work.

Q. You don't know whether they were through or not?

A. No, and if they were through, it would not have made any difference.

Q. Why not?

A. Because they were within the yard limits, and that engine is assigned to yard service at that point.

Q. Even if they were on their way to some other point, to do other work?

A. They still have the rule 107 to protect them while they were in these yard limits.

Q. That is your interpretation?

A. That is the company's interpretation.

Q. That is your interpretation?

A. It is the standard interpretation.

Q. Is there a difference in the wages that is paid to yard crews and road crews?

A. In some cases.

Q. Do you know whether these men were paid yard wages or road wages?

A. They were paid road wages.

Q. They were paid road wages?

A. Yes.

Q. They were not paid yard wages, were they?

A. They were not paid yard wages.

Q. You say rule 998—that is the rule in general practice for firemen?

A. Yes, firemen.

Q. So with 997?

A. I would say so.

Q. Would you say that that applied to his conduct in going through the yard limit?

A. What page, please?

Q. 102 in the book.

A. Yes, 998 also applies.

Q. 997 and 998, they applied to his conduct in the yard limit, just as well as any other place, do they not?

A. Yes.

Q. Rule 663, on page 81, which reads, "Engine men and trainmen must not accept clear hand signals as against fixed signals until they are fully informed of the situation and know that they are protected. Where fixed signals are in operation trainmen must not give clear hand signals against them." Is there anything in the language of that rule, without reference to any other, that discriminates between yard limits, or any other place?

A. That rule has reference wholly to interlocking plants.

Q. Where does it say so?

A. It has reference there to fixed signals.

Q. Again, that is your interpretation, is it not?

A. It is the company's interpretation.

Q. But, as far as the language itself is concerned, nothing is said about that, is there? I mean, as far as the words there are concerned, nothing is said there, except that is your interpretation?

A. That rule has reference wholly to interlocking plants.

Q. That is your interpretation?

A. That is the company's interpretation.

Q. The words of this do not show that?

A. Yes, they show it. It speaks for itself.

Q. That is your answer, that it speaks for itself?

A. The rule speaks for itself.

Q. It does not require any interpretation?

A. Not necessarily.

Q. Rule 366, which reads "When it is necessary for a train to cross over, the conductor, before crossing or returning, must notify the signal man and obtain permission to do so," you say that refers—

A. To interlocking plants.

Q. Is that your interpretation, or does the rule show that for itself?

A. The rule shows that for itself.

Q. It does?

A. Yes.

Q. Rule 99 (a), on page 21, reads as follows: "On double track, when a train crosses over to or obstructs the other tracks, unless otherwise provided, it must first be protected as prescribed by rule 99, in both directions on that track." As far as the language of that rule is concerned, does that show it applies to yard limits, or not?

A. That applies to all trains and engines on any

part of the road, except to yard engines working within the prescribed yard limits.

Q. Does it say so in the rule, any exception made there?

A. Rule 107 takes care of that.

Q. Is there any exception made here, where this rule is given, 99 (a)?

A. There is no exception.

Q. No exception made there at all, and that rule refers to rule No. 99, where it says that they must protect the hands by a flag or torpedoes, as the case may be?

A. Yes.

Q. Did you know that Young was running an extra train this morning?

A. I did know it, yes.

Q. A freight train, was it not?

A. Yes.

Q. A stock freight train?

A. Yes, it consisted of stock and dead freight.

Q. Bound from Haucks to Jersey City?

A. That was its destination.

Q. On the main line?

A. On the main line.

Q. Yet you say that was an inferior train to this yard engine, working back and forth in the yard limits?

A. Yes.

Q. An inferior train?

A. Yes.

Q. What instruction was given to Mr. Young, apart from handing him his book of rules, if you know?

A. He was examined on the rules, on the time table and rules.

Q. How do you know that?

A. I have seen the examiners' certificate that was issued in his favor.

Q. When was that?

A. I do not recall the date.

Q. You were not present in the examination that was made?

A. I was not.

Q. You do not know what was done in that respect?

A. I do not know that he passed.

Q. Yes, he passed a certain examination, they asked him a few questions about the rules, and handed him this, and that is about all?

A. The examination does not consist of a few questions.

Q. Do you mean to say that they go over every rule in the book?

A. They go over everything in the book.

Q. Have you ever been present at one of those examinations?

A. Yes.

Q. Are you familiar with every rule in the book?

A. Yes.

Q. You are positive of that?

A. Yes.

Q. You were present when Mr. Young was examined in that way?

A. I have conducted such examinations myself.

Q. Were you present when Mr. Young was examined?

A. I was not.

Q. Did you have any official of the company to give Mr. Young any instructions on the book of rules?

A. Yes, sir.

Q. Who is he?

A. Mr. C. A. Brobst.

Q. Is he here?

A. He is here.

Q. He will speak for himself.

Re-direct-examination.

By Mr. Dickson:

Q. I call your attention to that rule 99 (a) on page 21, and especially to the language "unless otherwise

provided." You said a little while ago in cross-examination that there was no exception?

A. So far as all road trains are concerned, there is no exception.

Q. Road trains?

A. Except as otherwise provided. That permits a yard engine, within yard limits, to cross from one track to the other, clearing the schedule trains.

Q. Then rule 107 is the other provision that harmonizes and fits in with this rule?

A. Yes.

By Mr. Koons:

Q. That is your interpretation?

A. That is the company's interpretation.

The Court: There is a little inconsistency there. Does not rule 99 (a) speak of a train?

Mr. Dickson: I think that is right.

The Court: That is a train under the definition, which is with markers?

Mr. Dickson: Yes.

The Court: And 107, then, applies to yard engines, which is not a train, and 99(a) applied to a train, and if this was not a train, under the definition, it would not come under that rule?

Mr. Dickson: Yes.

The Court: I ask you that so that both sides may know.

By Mr. Dickson:

Q. You have heard the judge's question. Will you answer his Honor? Explain about that.

A. Rule 99 (a) requires trains to cross from one track to another, to protect themselves, but does not apply to yard engines when they are working within yard limits.

Q. You were referring to rule 366 on page 63, and

you stated that that rule was a part of the interlocking system rules—at least, that it had nothing to do with this matter. Will you look back to pages 52 and 53, and see whether they throw any light upon the question as to what this rule applies to?

A. 663, you say?

Q. Pages 52 and 53, and see whether those pages throw any light upon the application of rule 366 on page 63?

A. Yes. That is the telegraph block system.

Q. And these rules that follow, beginning at number one, and up to and including this rule 366, relate to that system, do they?

A. They relate to the telegraph block system.

Q. What was the system at Siegfried? Was that the telegraph block system?

A. No.

Q. That you say was the automatic system?

A. That was the automatic signal system.

Q. Turning to page 81, you were asked whether that rule, in itself—

A. Rule 663?

Q. Rule 663—in itself showed that it had no application, in its own language, and you said it did, and you based that upon what words in there?

A. That has reference to accepting hand signals as against fixed signals on interlocking plants.

Q. What are fixed signals?

A. They are semaphores on masts, controlled from the tower.

Q. A part of the interlocking plant?

A. A part of the interlocking system.

Q. That is different from what you have at Siegfried?

A. Yes, there is no interlocking system at Siegfried.

Q. Then, look back to page 73. Will you see whether that throws any light on this question as to whether this is the interlocking rule?

A. Yes, that is under the interlocking rules.

Q. In other words, the interlocking rules begin on page 73?

A. Yes, sir.

Q. Then, in order that the jury may understand, my understanding is—please tell me if I am correct—I do not want to lead, but I think I can sum it up—this book seems to contain some general rules, and then certain special systems of rules, relating to different systems. Is that it?

A. Yes.

Q. You were asked the question as to the wages that were paid to the crew of engine 514. What does that have to do with the question 514 was at the time a yard engine?

A. It has nothing to do with it.

Q. Why not?

A. Because they were paid the high rate—that is, the road rate, for the reason that most of their work, the large part of their work was on the road.

Q. Whether or not the engine is treated as a road engine or as a yard engine depends upon what?

A. Depends on whether they are confined entirely to the yard limits, for the day's work.

Q. And does that have any relation to the work which they are doing?

A. No, it does not.

Q. Please state whether or not the same engine may be regarded as a road engine or as a yard engine at different times during the day?

A. It may.

Q. How does that apply to engine 514?

A. It would apply to engine 514.

Q. At the time it was in the yard limits, and was crossing this cross-over, where this other train came down, 184, what was it at that time?

A. It was a yard engine.

Q. You say there was a whistling post that was about 800 feet—

THE COURT: We have been over that twice. You brought it out and Mr. Koons brought it out.

MR. DICKSON: I want to ask him why it was placed there, what was the object of the whistling post?

By MR. DICKSON:

Q. Why was the whistling post placed there to cause the whistle to be sounded at that particular place?

A. For the station and crossing.

Q. For the station?

A. Yes.

By THE COURT:

Q. What crossing?

A. At the station.

By MR DICKSON:

Q. The station is beyond the cross-over?

A. Yes. I did not say the cross-over. I said the crossing, for the highway crossing at the station.

By THE COURT:

Q. Not for the cross-over?

A. No.

By MR DICKSON:

Q. That was not the purpose of it?

A. No.

Q. Where does the engineer have to blow his whistle, when he reaches a whistling post, before he passes it, or after he passes it, or where?

A. Usually approaching the post, or just passing it.

Re-cross-examination.

By MR. KOONS:

Q. You said, I believe, that a yard engine was an engine that did day's work around the yard, through the day?

A. Yes.

Q. And engines that do that kind of work, the men are paid yard wages?

A. If their entire work is in the yard, they get yard wages.

Q. As a matter of fact, is what you mean by a yard engine an engine that has work confined exclusively to yard limits? Is not that what you mean a yard engine?

A. No, an engine assigned to service within the yard limits for over ten minutes or six hours is a yard engine when it is there, and is protected by the yard limit rule 107.

Q. That is, it is an engine assigned to yard service, and when it is assigned to different kinds of service, as this engine was, to road work, then it is not a yard engine?

A. It is a yard engine when it is working within the yard limits.

Q. The mere fact that it is working within the yard limits, makes it a yard engine?

A. Yes.

Q. No matter what kind of cars it had?

A. When a train reached Siegfried, with its carriers, the conductor would take in his orders to the agent, as to where he was to require them—

Q. How do you know this?

A. It was testified to yesterday.

Q. Then you are just telling what somebody else said?

A. And it immediately became a yard engine.

Q. You are testifying to what you heard somebody else say, not your own knowledge?

A. I make those assignments. I know pretty near what they have to do.

Q. The fact does remain that this engine also did road work?

A. Yes.

Q. Then sometimes it occasionally dropped in here and did yard work?

A. Yes.
Q. The men were paid road wages?
A. Yes.

TOM R. DAY, recalled.

By MR. DICKSON:

Q. Mr. Curwin just testified to the location of a whistling post west of this cross-over. Will you kindly state where this whistling post was located?

A. The whistling post is 297 feet back of the 96-mile post—that is, to the west of the 96-mile post.

Q. That is, that many feet back of the 96-mile post?

A. Yes.

Q. How many feet is it back of the west track, or west of the cross-over?

A. 745 west of the cross-over.

Q. 745 feet west of the cross-over?

A. Yes.

(No cross-examination.)

WILLIAM H. ELLIOTT, having been duly sworn, was examined and testified as follows:

By MR. DICKSON:

Q. Where do you live?

A. In Albany, New York.

Q. What is your business?

A. Signal engineer of the New York Central & Hudson River Railroad.

Q. How long have you held that position?

A. Nine years.

Q. Are you familiar with the scene of this accident? Have you had experience with other roads?

A. Signal engineer for the Chicago, Milwaukee and St. Paul for ten years.

Q. What other roads?

A. With about three other railroads, about ten years' experience, having started as fireman, and worked up through the motive power department, as general foreman, and in the locomotive shops.

Q. Then you have had twenty years' experience as signal engineer on these two railroads?

A. I have.

Q. As such signal engineer do you have anything to do with the placing of signals along the line of the road?

A. I do. I locate them.

Q. You locate them?

A. Yes, and have charge of their installation. Also of the signal standards of the railroad.

Q. Do you, on your railroad, have the automatic block signal system?

A. We do.

Q. And does that operate in the manner which has been described as the way in which these signals operated?

A. Practically so.

Q. Have you seen the place of this accident?

A. I have.

Q. Will you now please state whether in your judgment the block signal 962 was placed in the proper location, and, if so, give your reasons?

A. It was a proper and satisfactory location, as signals are similarly located, on our own railroad. I regard the location of the signal as good and satisfactory.

Q. What are your reasons?

A. In that it would properly space trains, would give protection to trains entering the block, advise men whether or not the block was clear. It would give also a distance indication for the next signal in advance, telling an approaching train, or indicating to an approaching train whether or not the next signal in advance was out clear or not.

Q. What are the considerations that affect the placing of these signals along the line of the road.

A. First, the capacity of the track, or the number of trains which it is desired to run, the grades, the braking distance in which the trains could be stopped, the location of the switches, the views, and other things, so that the average railroad has become a standard or average—the average practice of signals would be located on mile blocks, which is good practice. Such signals would be located to give an even spacing of trains and place the signals in good view of approaching trains, and to stand in the rear of switches which they protect.

Q. You speak of standing in the rear of switches which they protect. You mean, as you reach the signal, before you reach the switch?

A. Exactly.

Q. And the braking distance, which you have defined, was the distance within which a train can be stopped, without undue strain, I suppose?

A. Yes, sir.

Q. What do you regard as a fair and proper braking distance for the place in question?

A. For a practically level track, it would depend, of course on the braking efficiency of the trains, and if the freight trains are limited to thirty-five miles an hour, or approximately that speed, sixteen hundred feet or two thousand feet would be a fair distance in which such a train could be expected to be stopped.

Q. And if a passenger train, running at a higher rate of speed—

A. Up to sixty miles an hour, it could be readily stopped in 2,600 feet.

Q. So that this distance, being three thousand feet, that you say you think is a proper distance?

A. Three thousand feet would in that case give ample distance even between the signals and the switch for a train to have been stopped.

By The Court:

Q. What do you make the distance between the semaphore and the switch?

A. According to the plan, it is 3,062 feet at least.

Q. Between that and the switch?

A. That and the cross-over switch.

By Mr. Dickson:

Q. Do you have any yard limits on your railroad?

A. Yes.

Q. And you have heard the testimony as to the rule that is in force on the Central Railroad of New Jersey?

A. I have.

Q. How does that rule correspond or differ from your own?

A. It is practically the same.

Q. Are you familiar with the language of that rule?

A. Yes, sir.

Q. Taking into consideration that yard limit rule and the location of the signal as being this 962 within the yard limits, what right did the signal, showing clear as it approached, this extra train, give Young to proceed at the rate which he did through that yard?

A. None at all, except that the train need not to have stopped before passing the signal.

Q. If the signal had shown danger, what would his duty have been then?

A. Under the rules, the train would have had to stop at a signal, to comply with the rule of the signal indicated, indicating stop. The train must stop before passing the signal.

Q. But the signal showing clear, being within the yard limits, you say it had nothing to do with that case?

A. Nothing to do.

Q. Except he did not have to stop?

A. No.

Q. What do you understand running under control to be?

A. To enable the engine man to bring the train to a stop within vision.

Q. Within vision?

A. Yes.

Q. Within vision of what?

A. Of what he can see ahead of him on the track.

Q. And if his vision is limited to three or four car lengths by conditions of the weather, does that have any effect upon the rate of speed at which he may run?

A. It does. He must run no faster than he can stop within the space ahead in which he can see.

Q. Is that the practice and construction of the rules of your railroad?

A. Yes.

Q. And it is the condition with this yard limit, in this same way?

A. Yes, sir.

Cross-examination.

By Mr. Koons:

Q. Will you read that rule in your book which you say is like rule 107 of the Central Railroad of New Jersey?

A. This is rule 93 of the New York Central rules of the operation department, January 19, 1908. "Within yard limits, main tracks may be used protecting against first-class trains, second-class and extra trains must move within yard limits prepared to stop unless main track is seen or known to be clear. Location of yard limits will be designated in the time table."

Q. These yard limits are usually indicated by boards, are they not?

A. Yes, sir.

Q. Do you know where the yard limit board is in this yard at Siegfried?

A. I saw it at the time that we looked the ground over.

Q. Where is it?

A. According to the plan and the testimony of the engineer, 2637 to the west of signal No. 962.

Q. That is about a mile above the cross-over?

A. Not quite half a mile.

Q. I was thinking of the other semaphore that is about a mile. About half a mile?

A. Yes.

Q. Do you know how close it is to the east-bound track?

A. I do not recollect how far. It is usually placed six or seven feet.

Q. I am not asking what is usually done. Do you know where this yard limit board at the upper end of the Siegfried yard was located on the day of this accident?

A. I do not.

Q. You do not know whether it was over to one side, along the river bank?

A. I do not.

Q. You do not know whether the condition of the weather permitted his seeing this yard limit board?

A. I do not.

Q. Do you have any other rules with reference to the movement of extra trains within yard limits?

A. Not that I know of. There may be others that may have an effect on the matter, but it seems to me that that was the rule—I know in our practice our rule is principally the one affecting the movement of trains within yard limits.

Q. Do you have any means of protecting extra trains under circumstances like those in yard limits?

A. No, sir.

Q. No ones whatever?

A. None that I know of.

Q. Do you have any means to show to a yard engine—

(Objected to.)

Q. Do you have any other device or method by which these yard engines, coming out on the main track like this, have any warning of the approach of an extra train of this kind, or any train?

(Objected to.)

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

A. We have regular signals when located adjacent to a cross-over switch, that will show when there is a train approaching. We also have on certain divisions only switch indicators.

Q. Do you have switch indicators in your yard limits?

A. We do.

Q. On your main lines?

A. On our main line, and I think it is also germane to the question to say that we have now decided to dispense altogether with switch indicators, and not to install any more of them.

Q. That is, at the present time, but we are talking about 1909, October 9, the date of this accident. Then you had them in use?

A. We still have them in use.

Q. You still have them in use?

A. Yes, in some places.

Q. But you have them in the yard limits?

A. In some places only.

Q. Generally speaking, most places?

A. No, sir.

Q. What is the object of those indicators?

A. They are supposed to give warning to train men when a train is approaching, but we find train men do not observe them.

Q. That is the reason, because train men do not observe them?

A. It is hard to keep the indicators working, so, on account of their maintenance, we have not installed them on more than one-half of the tracks that are equipped with automatic signals, and have now determined to dispense with them altogether.

Q. But if there had been an indicator at this cross-over, and working properly, then that engine crew or the road engine crew would have had notice of the approach of this train.

(Objected to. Objection sustained.)

(Exception noted for plaintiff, by direction of the Court.)

By Mr. Koons:

Q. Then, in your opinion, if Mr. Young was not running his engine so that he could stop immediately upon seeing another train, then it was his own fault?

A. He was at fault.

Q. Then it was his fault?

A. Yes.

Q. No matter how suddenly this danger came upon him, he was obliged to stop his engine at once?

A. That is right. He should have stopped.

Q. As a matter of fact, do your engineers, with these extra road trains, run through the yards in that way?

A. Yes, sir.

Q. They do. How do you know that? By observation?

A. By observation and inquiry.

Q. The latter part is not of your own knowledge. A freight train of this kind is supposed to make good time, is it not?

A. Supposed to make the run according to the instructions of the superintendent.

Q. Answer my question first. They are supposed

1899

to make good time, are they not, a stock train?

A. I don't know.

Q. A live stock train?

A. I would like you to get that from the operating official of the railroad.

Q. You are brought here as an expert on this thing?

A. Yes.

Q. We want your view. Is it not a matter of fact that live stock freight trains, especially—

THE COURT: I do not think that helps us.

MR. KOONS: It has something to do with the question of the speed.

THE COURT: It does not enlighten us at all.

(Question withdrawn.)

By MR. KOONS:

Q. What other precautions, if any, did you take for the protection of an extra train of this kind?

A. Within yard limits?

Q. Yes.

A. None at all.

Q. None at all. You let them shift for themselves?

A. Yes, sir. That is all the rule requires us to do.

Q. You then bind them down to a hard and fast rule?

A. Yes, sir.

Q. And whether that rule is specifically called to their attention you do not know?

A. What is that?

Q. Whether rule 107 in this case was especially called to the attention of the engineers, you do not know?

A. I know that our engine men are examined on the rules before they are allowed to run an engine.

Q. I understood you to say, though, that if the signals showed "stop," then of course he has to stop?

A. Yes, sir.

Q. And if they did not show stop, he can go ahead?
A. Go ahead under rule 107.
Q. But he could go ahead?
A. He could proceed, yes, sir.

Re-direct-examination.

By Mr. Dickson:

Q. You said that Young was at fault?
A. Yes.
Q. How about engine 514?
A. He had the right to use the cross-over switch, provided there were no scheduled trains approaching or due.
Q. And the conductor having testified that the next scheduled train was not for twenty minutes, not until 8:36, under your interpretation of the rules, engine 514 did or did not have the right to come out on that track?
A. He did have the right.

Re-cross-examination.

By Mr. Koons:

Q. Without doing anything to protect an oncoming train, or giving warning of his doing that thing?
A. Without doing anything.
Q. As a matter of fact, the working of that rule results in frequent collision, does it not?
A. Not that I know of.
Q. Not that you know of?
A. No.

J. M. Waldron, having been duly sworn, was examined and testified as follows:

By Mr. Dickson:

Q. Where do you live?
A. Highwood, New Jersey.
Q. And with what concern are you connected today?

A. Signal engineer of the Inter-borough Road, New York City.

Q. Elevated road?

A. Elevated and subway.

Q. Signal engineer?

A. Yes.

Q. With what other railroads or companies, including railroads, have you had connection?

A. Prior to going with the Inter-borough Company, nine years ago, I was with the New York Central, and previous to that time with the Union Switch and Signal Company, first in the shops and then out on the road as an engineer, including the stationary interlocking signalling on the Reading Road, Pennsylvania Road, including these terminals in Philadelphia, the Lehigh Valley, the Boston & Maine, the New York, New Haven & Hartford, the New York Central, the Pittsburg & Main Central.

By The Court:

Q. What number of years?

A. That started altogether twenty years ago.

By Mr. Dickson:

Q. And you were with the Union Switch & Signal Company how long?

A. About seven years.

Q. Have you taken any steps to keep yourself familiar with the practice of steam railroads in connection with other signal systems?

A. Yes, sir.

Q. Are you the member of any society of engineers?

A. The American Railway Signal Association.

Q. You are a member of the American Railway Signal Association?

A. Yes.

Q. The membership of that includes signal engineers of other roads?

A. Signal engineers of the United States, and some of the foreign countries, and other railroad officials.

Q. Is there any periodical or magazine that deals with these engineering questions?

A. Yes, sir, the "Signal Engineer."

Q. Any other?

A. Publications appearing in the "Railroad Gazette" and the "Railroad Age," the "Railroad Review," and electrical journals, such as the American Electrical Railway Journal, and other journals.

Q. Do you keep yourself familiar with these magazines and those periodicals?

A. I do to a certain extent.

Q. Do you know the scene of this accident?

A. I have been there, yes, sir.

Q. You have seen the location of the yard limits of this signal 962?

A. Yes.

Q. And this cross-over switch?

A. Yes, sir.

Q. Will you please state whether in your opinion this signal 962 was located in accordance with the standard railroad practice?

A. I believe it was so located.

Q. Please give your reasons for so saying.

A. It is a portion of a continuous system of signal blocks about a mile apart, and is located a certain distance back of the cross-over, which is a good braking distance for trains moving at the speed which they can move, should they pass the signals at that speed.

Q. So that if a train was approaching a signal, say an express train was passing a signal at a high rate of speed, and when it reached there it got a warning which would be given to it by the throwing of that switch at the cross-over, you mean there would then be time for it to stop before reaching that cross-over?

A. There would be time for it to stop before reaching the cross-over.

Q. Now, are you familiar with the defendant's yard limit?

A. Yes, sir.

Q. This cross-over and this signal 962, I believe you said, were within the yard limits?

A. Yes, sir.

Q. The testimony here is that when the engine Mr. Young was running on that morning reached the signal 962 both boards were clear or down, and indicating a clear block, we will say two blocks ahead of him clear. Please state what in your judgment the affect of that signal was, or what rights that signal gave Young, that being an extra train, and running into the yard limits.

A. It would only give Mr. Young the right to proceed at such speed wherein he could brake his train and stop at the distance he could see a clear track ahead.

Q. What do you understand to be the purpose of the yard limit rule?

A. For the purpose of protecting switch engines and permitting yard work to be accomplished, but not to be interfered with by special trains.

Q. By special trains such as an extra train?

A. That is an extra train, not on the schedule.

Q. Not on the regular time schedule?

A. Not on the regular time schedule.

(No cross-examination.)

C. H. Morrison, having been duly sworn, was examined and testified as follows:

By Mr. Dickson:

Q. Where do you live?

A. New Haven, Connecticut.

Q. What road are you connected with?

A. New York, New Haven & Hartford.

Q. How long have you been connected with that road?

A. Five years.

Q. What is your position?

A. Signal engineer.

Q. What road or roads were you connected with during that time?

A. Erie Railroad as signal engineer for four years. Rock Island as inspector for about three months.

Q. Inspector of signals?

A. Inspector of signals. Chicago, Milwaukee & St. Paul about eight or nine years as signal inspector.

Q. As such signal engineer do you have anything to do with the arrangement of signals along the line of the road?

A. I do.

Q. What do you have to do with them?

A. I prepare the plans for the location of signals, and after the same are approved by the proper officials, I install them.

Q. Are you familiar with the automatic block signal system?

A. Yes, sir.

Q. Please state to the jury what is the purpose of the automatic block signal. What does it accomplish in the running of a railroad?

A. It is for spacing, or equally spacing all through trains.

Q. By through trains, what do you mean?

A. Regular scheduled trains making through movements, not yard movements on the main line.

Q. You say not making yard movements. What does the automatic signal block system have to do with yard movements?

A. Nothing.

Q. Are you familiar with the scene of this accident?

A. I am.

Q. Did you see the yard limit board?

A. I did.

Q. And did you see signal 962?

A. I did.

Q. And where was 962 situated with regard to the yard limit board?

A. 962 was east of the yard limit board.

Q. And then east of that 962 you saw the cross-over?

A. I did.

Q. Please tell the jury whether or not in your opinion, signal 962 was properly located under standard practice?

A. I consider it so.

Q. What are your reasons?

A. It is located within say braking distance from the cross-over. It is located with proper relation to the curve just west of the signal so as to give a good unobstructed view to a high speed approaching train.

Q. Suppose a high speed approaching train approaching that signal found it set at danger as the result of the operation of the switches at the cross-over, would or would not such train have time to stop before reaching the crossing?

A. I consider it would have.

Q. What rights did the fact that this signal showed clear when Young's train approached 962 give to him to proceed through this yard?

A. Only such rights as he could proceed according to the yard limit rules.

Q. And under the yard limit rules which have been read here in your presence, stating that he must proceed under control, looking out for yard engines and other extras, what rate of speed had he the right to maintain?

A. Only so fast as he would be able to stop within his vision.

Q. And if his vision was limited to three or four car lengths?

A. I would consider that he should run very slow.

Q. You have heard the testimony that he was running in the neighborhood of twenty miles an hour. Was that or not in your opinion—

THE COURT: You are not giving him enough. You are giving him hypothetical questions, and putting things in that ought not to be in.

MR. DICKSON: I will not ask him the question.

By MR. DICKSON:

Q. What is the purpose of the yard limit rule as used by steam railroads?

A. Yard limits are established on the railroad for a purpose at a point where a great deal of work is required of yard engines, making it necessary for them to, at times, occupy the main track.

Q. And the yard limit rule gives these yard engines protection in doing the work. Is that right?

A. A yard engine has a perfect right to make yard movements, or drilling movements, on the main track, between yard limit boards, so long as it does not interfere or obstruct the movement of scheduled trains.

Q. You say you have been on other roads. Are you also a member of this society of signal engineers?

A. I am a member of the railway signal association. I was president of it.

Q. You have been president of that association?

A. For one year.

Q. Are you familiar also with those publications that have been referred to?

A. I subscribe for them and have them on my desk.

Cross-examination.

By MR. KOONS:

Q. Suppose the work by the yard engine is done as a yard engine, and it comes out on the main track, to go down to attend to different kind of work, a different rule comes in, does it not?

A. I don't know when you would consider a yard engine was done with its yard work.

Q. When it is through shifting around in the sidings, and is out on the main track, and is moving down the main track, and has completed its yard work, has not it done its work then as a yard engine?

A. Not until it is coupled to his train and put the markers on it. If it should have cars to take along with it, wherever it was going, those cars should have markers.

Q. They should have?

A. And if the engine was going to run light, the engine should have markers.

Q. And yet if it were through with all the work of shifting and went out on the main track, and moving down the main track—

A. It is a yard engine until it has markers.

Q. That is what makes it a yard engine, not the character of work it does then?

A. As long as they remain in the yard limits.

Q. No matter what work it does?

A. No, sir.

Q. Every engine that comes into the yard limits is a yard engine when it comes in there?

A. If it has no markers on.

Q. If they forget to put the markers on it is a yard engine?

A. Yes.

Q. A passenger train or a freight train or anything?

A. Yes.

Q. Any engine, large or small, would be, going back and forth, all the time?

A. Not constantly, but there are drilling hours. There is sufficient amount of work there to require yard limits.

Q. And what provision is made for the protection of trains, that come down on these main tracks?

A. Spacing at a proper distance from the work being done, and the yard limit sign, which is considered a fixed signal.

Q. And how does that yard limit sign protect the man?

A. The yard limit sign protects any train working in the yard limits. The approaching train is supposed to be governed by the yard limit sign.

Q. Where are those yard limit signs usually placed?

Recess until 2 o'clock p. m.

WILLIAM H. WILLIS, having been duly sworn, was examined as follows:

By MR. DICKSON:

Q. Where do you live?

A. Dudley, New Jersey.

Q. With what company are you connected?

A. Erie Railroad Company.

Q. In what position?

A. Signal engineer.

Q. How long have you held that position?

A. About five years.

Q. Where were you before that; what were you doing?

A. I was with the Erie about two years previous to that as Supervisor and Inspector.

Q. Of signals?

A. Of signals.

Q. Before that what were you doing?

A. About fourteen years with the Pennsylvania.

Q. Pennsylvania Railroad?

A. Pennsylvania Railroad Company on construction and maintenance work, signals.

Q. Are you a member of this Signal Engineers Association?

A. The Railway Signal Association, yes, sir.

Q. Are you familiar with the scene of this accident?

A. Not thoroughly familiar. I went over the ground.

Q. You have seen the place?

A. Yes, sir.

Q. Do you recall the location of signal 962 with reference to the yard limit board and the cross-over switch?

A. I do.

Q. Will you please state to the jury whether, in your opinion, that signal was properly placed.

A. It was placed according to general practice where signals are placed outside of yards and always placed about the same position as this signal you have spoken of.

Q. This signal 962 inside of the yard, I am asking you about that one. I am asking you only about the first signal you come into, inside of the yard?

A. East of the cross-over?

Q. West of the cross-over, before you reach the cross-over.

A. Yes, sir.

Q. How about the placing of that signal?

A. That is the one I have spoken of. It is properly located.

Q. I thought you said you were speaking about signals placed outside of yards. 962 I was speaking about, is the other one inside of the yard, not 972, but 962?

A. 972 is the signal, is it not, west of the cross-over?

Q. 962?

A. I cannot remember the numbers.

Q. Describe to the jury what signal you are referring to in your testimony now.

A. My remarks have reference to the signal west of the cross-over.

Q. About what distance from the cross-over?

A. As near as I can remember, approximately three thousand feet.

Q. Now, I ask you whether that signal was properly placed?

A. It was.

Q. What are your reasons for so stating?

A. It is necessary to have about that distance, in order that trains at all rates of speed can be properly stopped before reaching the cross-over. It is good braking distance.

Cross-examination.

By Mr. Koons:

Q. How soon after the accident did you come to this place?

A. It was some time.

Q. Days or hours; several days or several hours afterwards?

A. It was several days.

Q. You walked up along the east-bound track, I suppose?

A. We walked part way, and rode part way on the rear of a car.

Q. You went from the cross-over westward along the east-bound track?

A. Yes, sir.

Q. As far as the semaphore you are speaking of?

A. We went beyond that. We went outside of the yard limit.

Q. Did you see any whistle posts in the yard anywhere?

A. I cannot remember at the present time that I did.

Q. You did not notice any in the yard, did you, whistle posts?

A. I cannot remember that I did.

Re-direct-examination.

By Mr. Dickson:

Q. Were you looking for whistle posts?

A. No, sir, there was nothing said about whistle posts. Our attention was not called to any such markers or anything of whistle posts.

Q. There might have been whistle posts there without you seeing them?

A. Oh, yes; so many markers we pay no attention to.

Re-cross-examination.

By Mr. Koons:

Q. The whistle post is usually near the block?

A. It is about from seven to ten feet from the guage line of the right-hand rail, yes, sir.

Q. Is about six feet in height?

A. They average that.

Q. Painted white?

A. Usually white.

Q. A conspicuous article, is it not?

A. Yes, sir.

Q. Easily seen if you go along there if there had been one there?

A. If you were looking for them you could easily see them.

Q. If you were not especially looking for them—

A. We might see it and not remember. Whistle posts are so prominent that they do not attract any attention.

Q. Whether or not there was any there you do not know? That is a fair way to put it?

A. I could not say.

Will B. Weatherby, having been duly sworn, was examined as follows:

By Mr. Dickson:

Q. Where do you live?

A. In Jollette, New Jersey.

Q. With what railroad are you connected?

A. Delaware, Lackawanna and Western.

Q. How long have you been with that company?

A. About six years.

Q. And your position?

A. General Signal Inspector.

Q. Have you been connected with other railroads?

A. Yes, sir, have been connected with the New York Central, Boston and Maine, Boston Elevated, New York Subway, Brooklyn Rapid Transit. That is all.

Q. In your different connections with these different railroads has your work been in the signal department?

A. Always signal work.

Q. Have you seen the place of this accident?

A. Yes, sir.

Q. Will you now tell the jury whether, in your opinion, that signal 962 was properly placed, and if so, give your reasons?

A. Signal 962 was, in my judgment, properly located. The spacing of the signals through that territory was about one mile, which is customary, and I believe general practice, and good practice. As far as the location of the cross-over is concerned in the block, that cross-over may have been anywhere, and still the signal be in good location.

Q. But in this case how about the braking distance to the cross-over?

A. The braking distance of three thousand feet I consider that all right.

Q. So that the signal was arranged both as to the general distribution of the blocks along the road, and also comes the proper distance from this cross-over. Is that what you mean?

A. Yes, sir, only I did not want it to be inferred I meant the cross-over should be three thousand feet

from the signal. It is not necessary. It is not necessary to have the cross-over in any particular place as far as that signal is located. The signal ahead of that, No. 952, as I remember it, is located at the throat of a small road, or several tracks that branch into the main line. 952 protects this switch, which is good practice. This 962, which is about a mile back, seems to me could not be placed in any other place than where it is.

Cross-examination.

By Mr. Koons:

Q. Did you observe any whistle post between the cross-over and the semaphore, three thousand feet above it, on the eastbound track?

A. No, sir.

Q. You went along there, did you not?

A. I went along there, yes, sir.

By Mr. Dickson:

Q. Do you mean to say there was not any such post there?

A. No, sir, I do not. I did not notice any.

Frank P. J. Patenall, having been duly sworn, was examined as follows:

By Mr. Dickson:

Q. Where do you live?

A. Baltimore.

Q. With what company are you connected?

A. Baltimore and Ohio.

Q. What is your position?

A. Signal Engineer.

Q. How long have you held that position?

A. Twenty years.

Q. You have been twenty years with that railroad?

A. Twenty-four years with that railroad.

Q. Twenty years as signal engineer?

A. Yes, sir.

Q. Are you familiar with the scene of this accident?

A. I think, in a general way.

Q. Have you examined the layout of the signals there, the general location of them?

A. Yes, sir.

Q. Will you please tell the Court and jury whether the signals 962, 972 and so on were properly placed?

A. The locating of automatic signals is probably one which requires thought and care. In looking over this particular situation I found that that automatic signal 962 in question is located as well as it could have possibly been; not only to provide approach sight, but also to provide approach information to the cross-over beyond, which it protected.

Q. Do you happen to know the yard limit rule of your company?

A. With reference to the rule, yes, sir. I do not know that I can memorize them, but I can read them for you.

Q. What is your Rule 97 covering the operation of the yard?

A. Our Rule 97 is as follows: "Yard limits will be indicated by yard limit boards. Within these limits yard engines may occupy main tracks, protecting themselves against overdue trains."

Q. Is an overdue train a scheduled train, or an extra train?

A. A scheduled train.

Cross-examination.

By Mr. Koons:

Q. Does your Rule Book have any other rules with reference to the movement of trains in yard limits?

A. We have.

Q. Is that the only rule you have on the subject?

A. We have a Rule Book which refers specifically to the movement of trains in automatic signal block limits.

Q. How soon after the accident did you get to Siegfried?

A. I believe we looked over the ground in November, 1911. How long after the accident that was, I cannot tell you.

EUGENE M. WEAVER, having been duly sworn, was examined as follows:

By MR. DICKSON:

Q. Where do you live?

A. Jamaica, Long Island.

Q. What road are you connected with?

A. Long Island Railroad.

Q. What is your position?

A. Engineer of Maintenance of Way.

Q. How long have you held that position?

A. Since last July.

Q. Before that what was your position?

A. Signal Engineer on the same road.

Q. How long were you Signal Engineer?

A. Eight years.

Q. Do you know, or have you seen the place of this accident?

A. Yes, sir.

Q. Will you please state to the Court and jury whether in your opinion the signals were properly placed?

A. I should say it was. It seemed to be in accordance with general signal practice all over the country. I can answer for my own road that we would do about the same thing under the same circumstances in the same location of switches, and so forth.

Cross-examination.

By Mr. Koons:

Q. When did you see the place of this accident?

A. I think it was some time in November.

Q. Last November?

A. Yes, sir.

Charles A. Brobst, having been duly sworn, was examined as follows:

By Mr. Dickson:

Q. Where do you live?

A. Mauch Chunk, Pennsylvania.

Q. You are connected with the Central Railroad of New Jersey?

A. Not at the present time, not actually connected. I have been detailed or loaned by the Central Company to the American Railway Association, doing some special work.

Q. What is that special work?

A. I am making a compilation of the railroads that belong to the American Association, compiling the rules of the different roads.

Q. Compiling the rules of the different roads?

A. Yes, sir; the rules and regulations; making a compilation for, I believe, to be used by the Interstate Commerce Commission. I am not quite sure about that. The information, I think, was asked for, and they got me to do the work. I am doing the work for the American Railway Association.

Q. What work were you doing for the Central Railroad of New Jersey before you were detailed on the special work?

A. I was employed as a train rule examiner and instructor.

Q. Did you know this man Peter Young, who was an engineman?

A. I have met him on several occasions when he came in to be examined. Personally I did not know much about the gentleman, only when he came in to me. I knew he lived in Mauch Chunk and worked on the road. I knew him to see him on the street.

Q. You say you saw him at the time you examined him?

A. Yes, sir.

Q. When did you examine him?

A. On December 22nd, 1906, that is when he came in to qualify as an engineer. I may have had previous to that when he was a fireman. I have not any record with me of that.

Q. I hand you a paper which is headed "Examination Record of Peter Young", and ask you if you know what that record is?

MR. KOONS: Who made up that record?

MR. DICKSON: That is what I am going to ask him, if he knows what it is and who made it.

By MR. DICKSON:

Q. Do you know what that record is?

A. I do.

Q. Who made it?

A. I did.

Q. You made it?

A. Yes, sir.

Q. When did you make it?

A. December 22nd, 1906.

Q. On what occasion?

A. When Mr. Young was sent to me to qualify as an engineer on the rules and regulations.

Q. When you examined him at that time what kind of an examination did he pass?

A. This shows he passed with an average of 98.

Q. Out of a possible what?

A. A possible 100.

Q. Passed with an average of 98 per cent.?

A. Yes, sir.

Q. Judging from the result of that examination, is that a high or low average?

A. That is considered high.

Q. On what rules did you examine him?

A. On all the rules in that book that pertained directly or indirectly to his duties as an engineer. For instance, I did not go over the rules, as an illustration, of passenger brakemen questions, like "How to call out stations"; "Not allowed to read newspapers or smoke on duty". Those rules I skipped, That is, I did that on my own responsibility. The form, of course, shows room on there for every question in the book, which I would have the privilege to ask if I felt so inclined, or thought I should ask him. That is up to me.

Q. Did you examine him on Rule 107?

A. Yes, sir; the form would show that.

Q. Did you examine him on that rule?

A. I am positive I did; yes, sir. That I would consider and always did consider one of the important rules. It is a rule that is important to an engineer, conductor or trainman of any description. I never did skip a rule of that kind. I am positive of that.

Q. Did you explain to him the meaning of Rule 107?

Mr. Koons: What did he tell him?

By Mr. Dickson:

Q. What did you tell him about Rule 107?

A. We have a question on Rule 107?

Mr. Koons: Ask him what he told him.

By Mr. Dickson:

Q. Did you ask him that question, or what did you ask?

A. I will give you the question: "How must all extra trains run through yard limits?"

Q. That was the question?

A. Yes, sir.

Q. The answer to that is, what?

A. "Under control, looking out for yard engines and other extras."

Q. Did you explain to him what "Under control" meant?

A. Always do.

MR. KOONS: I move that that reply be stricken out.

By MR. DICKSON:

Q. I asked you whether you did explain to Peter Young what "Under control" meant?

A. I did.

Q. What does "Under control" mean?

A. It means that an engineer, when he is under control should be able to stop within the distance he can see.

Q. You said that you have been doing some special work recently on the rules of the railroads of the country. Did you have anything to do with the rules of the Central Railroad Company of New Jersey and the Philadelphia and Reading Company, and if so, what?

MR. KOONS: When?

By MR. DICKSON:

Q. And when?

A. I will have to explain, when these rules were put into effect—

Q. When was that?

A. In March, 1903—the Philadelphia and Reading Company also put into effect practically the same rules, the American Association rules. We had a union meeting at Philadelphia, that is, the instructors, the examiners and officials went over these rules together; had a general meeting and tried to teach them. We were instructed to teach these rules in a uniform way on both roads.

Q. So as to have the same construction?

A. Yes, sir; so if a P. & R. train came over the Central tracks, which they do, from Bound Brook to Jersey City, or a Central train ran from Bound Brook to Philadelphia over the P. & R. tracks, the one examination would qualify on both roads.

Q. In consequence of that conference you had there in Philadelphia what was done by the two railroad companies in reference to promulgation of rules?

A. I do not quite understand you.

Q. What did the railroad companies do; did they adopt rules or did they not?

A. These rules were adopted in March, 1903.

Q. How about the Philadelphia and Reading?

A. Theirs, I think, took effect a short time previous to that, that is, they had been teaching the rules but they had not become effective. They both became effective on both roads March 1st, 1903, but they were a little ahead of us in getting their instructors out, as I remember it. Their book, of course, shows that. I think you will find both dates the same, March 1903.

Q. While the two rules books bore the same date, their practice antedated yours; is that it?

A. Yes, sir.

Cross-examination.

By Mr. Koons:

Q. Does that paper show on what rules you examined Mr. Young?

A. It does, yes, sir, to me, but not to an outsider. There is a book of questions goes with this form.

Q. How many rules does that show that you examined him on?

A. Three hundred and seventeen.

Q. What was the first one you examined him on, taking from the lowest number to the highest?

A. The first question?

Q. The first rule you examined him on?

A. The first rule on here, it is not a rule. We take his name and so on, a record.

Q. I mean rule.

A. The first rule would be, "How often and when is standard time telegraphed to a point?"

Q. The next one.

A. Previous to that we have them go over the definitions, which also show in this form. He gets credit for that.

Q. Is that marked on there to take him over the definitions?

A. Yes, sir.

Q. What next?

A. Rule 2 is "How often must you have your watch examined by the watch inspector?"

Q. The next rule.

A. "What is your duty before going out on each trip about conforming your watch with a standard clock, and registering in a book prescribed for that purpose?"

Q. The next rule.

A. "How do you get standard time when you cannot get to see or have access to the standard clock?"

Q. Under movement of trains what rules did you examine him on?

A. Movement of trains?

Q. Speaking from your—

A. This is represented by A, B, C, D on the form.

Q. I believe you understand the interpretation of it.

A. I could not exactly point it out. They are with the book of questions. I have not got the book here.

Q. Then you do not know what rules you examined him on under movement of trains?

A. I can tell you by that I examined him on all the movements. They are shown there in full-faced type.

Q. Can you tell that without the book of questions?

A. I think I can, yes, sir.

Q. You think you can?

A. I can.

Q. Are not you testifying here upon what was your habit and custom, instead of what actually happened so far as you know?

A. I am testifying I went over the rules with Mr. Young the same as any other engineer.

Q. Where was it you examined him?

A. Mauch Chunk.

Q. Whereabouts in Mauch Chunk?

A. In an office I have there.

Q. Where?

A. Right close to the station; in the old building, we call it. It is the old despatcher's office.

Q. Anybody present when you examined him, when you went over the rules with him?

A. That is not permitted, except of course—

Q. I did not ask you that. I asked you whether there was anybody?

A. Not to my knowledge, no, sir.

Q. Do you remember distinctly the day and time that you examined him on these rules?

A. I remember Mr. Young coming in. That is about all, and the papers here show.

Q. How many other enginemen did you examine that same day?

A. Mr. Young was examined—that I could not say unless I would have my record or get the record.

Q. How long a time did you take in going over this examination?

A. With Mr. Young I could not positively say. As a rule—

Q. Not as a rule. With him?

A. Five hours.

Q. It took you five hours?

A. Yes, sir.

Q. Is that your recollection or your belief based upon your habit in other cases?

A. No, sir; that is my recollection of this particular case.

Q. It took you over five hours?

A. Yes, sir.

Q. Out of that five hours' questioning do you remember specifically you went over Rule 107?

A. The form shows it; yes, sir.

Q. When was that form filled out?

A. The same time I examined him. That follows right along.

Q. Does that show all the questions you asked him that day in those five hours?

A. Yes, sir.

DEFENDANT RESTS.

PLAINTIFF'S EVIDENCE IN REBUTTAL.

WILLIAM HAMMOND, recalled.

MR. KOONS: I offer to show by this witness there was no whistle post between the cross-over and the western semaphore.

By MR. KOONS:

Q. How soon after this accident did you go up to Siegfried?

A. I got there the next morning.

Q. Went through the yard?

A. Yes, sir.

Q. Did you see this cross-over?

A. Yes, sir.

Q. And the semaphore westward on the eastbound track?

A. Both of them.

Q. Both of them?

A. Yes, sir.

Q. How did you go along the track there, walk or ride?

A. I was walking.

Q. Walking?

A. Yes, sir.

Q. Was there any whistle post at that time between this cross-over, where the accident occurred, and the first semaphore west from there, on the eastbound track?

A. No, sir; not to the best of my knowledge.

Q. Do you remember which track you walked along that day?

A. Yes, sir.

Q. Which one?

A. I was walking; I went up and met Mr. Gebhardt—

Q. I want to know along which track you went.

A. I went up the track next to the river, the southbound track.

Q. Southbound or eastbound track?

A. Yes, sir.

Q. You went up there from the cross-over to this semaphore?

A. Yes, sir.

Q. You saw no whistle post?

A. No, sir.

Q. Did you see a whistle post anywhere below this cross-over?

A. Yes, sir.

Q. How far below?

A. Twelve and a half rails this way from this cross-over.

Q. When you say this way you mean east?

A. East, yes, sir.

Q. Between the cross-over and the highway crossing, the road crossing?

A. Yes, sir.

Cross-examination.

By Mr. Dickson:

Q. You are the man that said yesterday you did

not know how many rail lengths it was from the Siegfried station to the cross-over, are you not?

A. I had not counted the rails. I was looking to see where this accident happened.

Q. You were looking to see signals, were you; what were you looking to see?

A. I was looking to see whatever I could see or find to the interest of my sister.

Q. You mean to say you did not see a whistle post there?

A. There was no whistle post west, that is above the cross-over switch, where Mr. Gebhardt told me this accident happened, but south, twelve and a half rails this way was a whistle post up on the bank.

Q. Do you say positively there was not any whistle post there?

A. Not that I have saw.

Q. Not that you saw?

A. No, sir.

JOHN H. BARTLETT, recalled.

By MR. KOONS:

Q. You have heard the testimony of some of the witnesses for the defendant as to the presence of a whistle post between the cross-over, where the accident happened, and the semaphore to the west?

A. Yes, sir.

Q. And along the eastbound track, between it and the river?

A. Yes, sir.

Q. Was there ever a whistle post there prior to the accident?

A. Not to my knowledge. I never seen any.

Q. How often had you gone up to that point over that eastbound track, or down that eastbound track?

A. Two or three times a week.

Q. For how long a period?

A. A year.

Q. You were in the employ of the company as what?

A. Brakeman and flagman.

Q. Was there any whistle post south of the cross-over, that is east of the cross-over?

A. Yes, sir; about half way down from the station.

Q. And along the eastbound track?

A. Yes, sir.

MR. KOONS: In the presentation of the plaintiff's case when we were asking questions as to the meaning of certain rules, it was indicated that these rules spoke for themselves, but that if any question of interpretation came up, the plaintiff could have his opportunity for rebuttal.

THE COURT: There is no objection to that.

MR. KOONS: The defense has given their interpretation. We want to show what our interpretation is.

THE COURT: That would be rebuttal.

By MR. KOONS:

Q. How long had you been in the employ of the Central Company all together in different capacities, prior to the accident?

A. About fifteen months.

Q. How long were you a brakeman?

A. Brakeman and flagman is the same, pretty near the same capacity.

Q. On what kind of trains?

A. All kinds.

Q. All kinds of trains?

A. Yes, sir.

Q. Tell me what some of those trains were?

A. I have been on yard engines; I have been on coal trains; I have been on local freights.

Q. During those fifteen months of employment for the defendant?

A. Yes, sir.

Q. Tell me where, in what yard limits of the defendant company, you were employed on yard engines?

A. Down to Bethlehem and Allentown.

Q. How long at Bethlehem?

A. Generally sent down there sometimes twice a week.

Q. Twice a week?

A. Yes, sir.

Q. And Allentown, you say?

A. Yes, sir; off and on.

Q. What other places?

A. Coalport Yard, Mauch Chunk—

Q. Over at Siegfried?

A. No, sir; not only with gravel trains.

Q. You have been in these different yards?

A. Yes, sir.

Q. Working the yard engines?

A. Yes, sir.

Q. What instructions, if any, were you given with reference to the movement of yard trains into the main tracks and cross-overs?

Mr. Dickson: By whom?

By Mr. Koons:

Q. By whom were you given instructions?

A. Mr. Brobst.

Q. What instructions were you given with reference to the movement of trains such as this yard engine in this particular case?

A. To prepare myself with rule 99 A.

Q. In connection with those instructions what was done when you came out in the yards with yard engines on to main tracks?

A. Always protected myself with a red flag or red lighted light.

Q. In day time where did you put these red flags when you came out?

A. Generally used to have them in our hands, or in the back of the engine some place.

Q. You carried them for that purpose?

A. Yes, sir.

Q. Upon what trains did you use those?

A. All kinds.

Q. All trains?

A. Yes, sir.

Q. For what purpose?

A. To avoid accidents with oncoming trains.

Q. Did that apply to a case like this, where a yard engine came out on the main track and got ready to go away?

A. Yes, sir; you were supposed to protect yourself.

Q. Go up the track with the flag?

A. Yes, sir.

Q. Those were your instructions?

A. Yes, sir.

Q. And that was the practice there?

A. Yes, sir.

Q. You have also been on extra trains going through yard limits?

A. Yes, sir.

Q. You have gone through in all kinds of weather, I suppose?

A. Yes, sir.

Q. Clear weather and foggy weather?

A. Yes, sir.

Q. What was the customary rate of speed?

A. When we had the clear boards we generally used to go through there always fifteen or eighteen or twenty miles an hour.

Q. With trains of this description Mr. Young had that day?

A. Yes, sir.

Q. How often did you do that?

A. Every time you had a clear board.

Q. Every time you had a clear board?

A. Yes, sir.

Q. How often had you occasion to go through this yard especially with an extra train?

A. Two or three times a week, Mauch Chunk or Jersey City.

Q. During your fifteen months of employment with the Company?

A. Yes, sir.

Q. Did you ever have any instructions on Rule 107, as these men have testified to?

A. Yes, sir; when I went through the Rule Book, the book of rules, when I got examined.

Q. You got examined?

A. Yes, sir.

Q. Did they give you instructions with reference to Rule 99 A?

A. Yes, sir.

Cross-examination.

By Mr. Dickson:

Q. What rule did you interpret as giving you the right on extra trains to run through the yard at twenty miles an hour?

A. They generally all did it.

Q. What rule do you interpret as giving you that right?

A. No rule at all.

Q. You say you were instructed on Rule 107 and examined on it?

A. Yes, sir.

Q. You disregarded that rule, did you?

A. No; not as long as we had the boards.

Q. You disregarded that rule by running through there at eighteen or twenty miles an hour through fogs.

That is what you want this jury to believe, that you were in the habit of disobeying that rule?

A. We often went through. He asked how often we went through, and I said very near every time—

Q. You were discharged from this company for insubordination?

A. I do not know what you mean by that.

Q. You were discharged from this company, were you not?

A. Yes, sir.

Q. You know why you were discharged, do you not?

A. No, sir.

Q. You just got your discharge and no explanation as to why it came to you? You want the jury to believe that, do you?

A. I refused, after being out fourteen hours, to fire up 514 engine to Bethlehem.

Q. You refused to obey orders, did you?

A. Yes, sir.

Q. You want this jury to believe there is no whistle post to the west of that?

A. I did not see none.

Q. You did not see any?

A. No, sr.

Q. You do not want the jury to believe there is not any one there?

A. I do not know. I did not see none. I could not say there was.

Q. You are the man that testified yesterday that that signal 962 was two hundred or three hundred feet away from the cross-over?

A. I told you I did not know. I was not positive whether it was that far or not, because I did not take no measurements.

Q. You were trying to have the jury believe yesterday it was about three hundred feet away?

A. I was not there since the day that the wreck happened.

Q. You do not remember very much about it?

A. Not very much, no, sir, only what work I did.

Re-direct-examination.

By Mr. Koons:

Q. You say you had been out fourteen hours up to the time of this accident?

A. Yes, sir.

Q. After the accident you were requested to do what?

A. Fire that 514 engine.

Q. To where?

A. Bethlehem, the way I understood, to run that extra train for that other crew.

Q. You refused to do that?

A. Yes, sir.

Q. After that you were discharged?

A. Yes, sir, I was discharged.

Q. Where was your home?

A. Mauch Chunk.

Q. If you had run to Bethlehem how long would it have been before you got back home?

A. Would not get back home until about eight o'clock that night.

By Mr. Dickson:

Q. You could have slept in Jersey City, could you not, or anywhere else you went to that night, could you not?

A. No, sir; I was not to go to Jersey City. Our train was wrecked. I was to fire this extra.

Q. Where do you say you were ordered to take the 514 to?

A. To Bethlehem, I understood.

Plaintiff Rests.

DEFENDANT'S EVIDENCE SUR-REBUTTAL.

CHARLES A. BROBST, recalled.

By MR. DICKSON:

Q. You heard the testimony of the last witness?

A. I did.

Q. You heard him say that you had told him that in your yard limit, the rule for yard engines to be governed by was 99 A. Is that true?

A. Positively not.

Q. Do you remember examining that man?

A. I do not. Of course, if he has been examined he very likely knows that himself. I do not, unless I had the record with me.

MR. KOONS: If you did not examine him, that is sufficient.

By MR. DICKSON:

Q. Did you ever make that statement to any railroad man that you examined?

A. Not to Mr. Bartlette or anybody, because that is not the way I understand the rule.

Q. Did you ever instruct him, or anybody else that extra trains should run through yards with a clear board without any regard to the yard limit rule?

A. I did not.

Q. That they could run through there without being under control?

A. I did not.

Q. Have you any knowledge of any such practice on the railroad?

A. I have not.

Cross-examination.

By MR. KOONS:

Q. You say you have no knowledge of any such practice? Where is your office?

A. At the present time New York City, 75 Church Street.

Q. Where was it at the time of this accident?

A. On the morning of the accident I was in Mauch Chunk.

Q. Along there?

A. Mauch Chunk.

Q. What were your duties?

A. To examine the men upon the train rules; also instruct.

Q. As they came into Mauch Chunk?

A. As they were sent in. I went to different points on different days of the week.

Q. What were some of those points?

A. Jersey City, Long Branch, Ashley and Mauch Chunk, certain days each week.

Q. That about took up all your time?

A. I was kept pretty busy.

By Mr. Dickson:

Q. You are traveling on the road constantly between those places?

A. I get home on Wednesday nights and the next day I would start for Ashley and get back home on Thursday night, and finish up the week Friday and Saturday at Mauch Chunk.

Edwin Decker, recalled.

Q. You were, as I understand, the fireman on the train with Young and with Bartlette?

A. Yes, sir.

Q. How long had Bartlette been on duty that day?

A. From one o'clock in the morning October 9th.

Q. From one o'clock.

A. Yes, sir.

Q. From one o'clock until eight?

A. 8:15, the time of the wreck.

Testimony Closed.

Philadelphia, Pa., Thursday, February 22d, 1912.

CHARGE OF THE COURT.

HON. JAMES S. YOUNG, J. (specially presiding).

Gentlemen of the Jury: You have very attentively and very patiently for the past two days been listening to the evidence in this case. The case has been fairly and thoroughly tried by counsel for the respective parties, and it has been fully argued to you, and nothing remains now except for the Court to give you some instruction to guide you in the consideration of the case, and then your deliberations resulting in such verdict that you think ought to be brought in under the evidence. Of course all that patience and attention that you have given so far will not be of value unless you continue it to the end of the case, and therefore I bespeak from you a very careful consideration of the evidence until you shall have arrived at a verdict.

The evidence has been so thoroughly discussed by counsel that the Court is not required to talk much about it, and indeed it is not the province of the Court to discuss the evidence. I hope you will bear in mind that, in so far as I do recite any of the evidence, it is only for the purpose of giving you instruction for the purpose of guiding you in the consideration of the evidence, and not for the purpose of influencing your judgment upon the facts. The evidence is for the jury; the inferences from the evidence, the credibility of the witnesses and all those things pertaining to the evidence is for the jury; the responsibility is upon them to find the facts and the inference from the facts and the verdict, and therefore you will consider that you are not to be influenced in any respect by what the Court says about the evidence. Your recollection, your judgment and your inferences from the evidence is to be taken rather than any opinion the Court may seem to have expressed.

The case is the case of Martha Young, who brings her suit as administratrix, under the laws of New Jersey, of Peter B. Young, deceased, against the Central Railroad Company of New Jersey, and the action is to recover damages, which would be distributed, under the New Jersey law, to Mrs. Young and her two children, and it is those damages, arising, as it is claimed by the plaintiff, out of the negligence of the defendant in the operation of its railroad.

It is claimed by the plaintiff that on October 9th, 1909, about eight o'clock in the morning, near a station on the railroad of the Central Railroad of New Jersey, an accident happened to the train of which Mr. Young was engineer; that that was the result of negligence on the part of the defendant company, and that that negligence resulted in the death of Mr. Young.

The burden is upon the plaintiff to establish by the weight of the evidence, the negligence of the defendant Company. Unless the plaintiff has established by the weight of the evidence the negligence of the defendant Company your verdict would be for the defendant. The happening of the accident is no evidence of negligence. Too often we are inclined to consider an accident, especially not clearly explained, to be evidence of negligence, but the happening of an accident is not in this case evidence of negligence. The burden is upon the plaintiff to show you by the weight of the evidence the negligence of the defendant Company, and unless the plaintiff has done so, your verdict would be for the defendant. Therefore you must consider this evidence carefully in order to determine whether Mrs. Young has carried that burden so as to satisfy you.

The negligence that the plaintiff claims on the part of the defendant was in bringing out on to this track, on which the train run by Peter B. Young was proceeding eastward, the shifting train, so that there was a collision between Mr. Young's train and this shifting train.

As bearing upon the negligence you will have to take into consideration the rules of this Company, because the duty rested upon the defendant to provide rules and such rules as were reasonable and fair, and such rules as were known to the operating railroads, such rules as would be a protection for the employes.

The plaintiff has offered in evidence these rules, and has offered some interpretation of these rules, and under that interpretation he claims that it was negligence in the flagman and the engineman and the crew of this shifting engine to come out on that track without warning the train that was coming along that track.

The defendant has offered these rules and certain other rules, and has offered evidence contradicting, or tending to contradict the plaintiff's evidence, and for the purpose of showing that the rules that were provided for these employes on both trains were such as to secure the safety and the protection of the persons operating the trains. Now, we cannot make rules for the railroad, and therefore the defendant Company has offered the rules which it claims are reasonable and it has offered evidence tending to show that they are rules that are in force and effect on other roads and that they are rules that are intended, if obeyed, to produce safety and to protect the employes engaged in operating trains. Therefore you must look at these rules as they have been offered in evidence. You must consider the evidence as to what they mean as offered by the plaintiff. You must consider the evidence as offered by defendant's interpretation, and then from all that, as bearing upon the question of negligence, determine it. There is no claim here that there was an absence of semaphores or indicators. That has been abandoned, as I understand, by plaintiff.

The plaintiff claims that these rules properly interpreted, would allow the train which Mr. Young was acting as engineer of, to proceed through this yard at

a rate of speed, and that the responsibility of keeping out of the way was on the shifting engine; while the defendant claims that under these rules—and therefore you have heard the evidence of the signalmen as to the interpretation of this rule 107 especially—that if that rule were followed there was no occasion for an accident. This evidence also bears upon the question of contributory negligence, of which I shall shortly speak.

Now, Gentlemen of the Jury, therefore you take the evidence, and all the evidence that the plaintiff has offered, and you take the evidence, and all the evidence that the defendant has offered, and from all you determine whether or not there was negligence on the part of the defendant in the operation of this road, and that that negligence was the cause of the injury or the death of Peter B. Young, because, not only must the plaintiff satisfy you by the weight of the evidence of the negligence, but that the result of that negligence was the death or injury of the plaintiff's decedent. Now, Gentlemen of the Jury, if you should not be satisfied as I have said, by the weight of the evidence, of the negligence of the defendant Company, and that that resulted in this death of Peter B. Young, then your verdict would be for defendant. I am bound to say to you, Gentlemen of the Jury, that if that negligence was the negligence of the co-employes of Mr. Young, that would not prevent him from recovering because this suit is brought under an Act of Congress that provides that the negligence of a co-employe is the negligence of the defendant. That was not formerly the rule, but by an Act of Congress it is now the rule, so that the negligence of the co-employes, the crew of the shifting engine, being co-employes of Peter B. Young, that particular negligence would be the negligence of the Company, and because they were negligent would not prevent a recovery in this case.

Now, your attention will be directed to, and you

must determine how this accident happened. There are some facts and some evidence upon that question, especially the evidence relating to the position of the semaphore when they came in the yard; there is evidence as to the yard limit; evidence as to the position of this semaphore in the yard; evidence as to the position of the cross-over; evidence as to the rate of speed of the train; evidence as to the actions of the defendant's employes with the shifting train, and all that, and you must consider all that in determining the question whether or not there was negligence on the part of the defendant.

The defendant says not only was there no negligence on its part, but that these rules provide for the safety of the crew that was running this train, and all the persons engaged there in operating the road. And the defendants say that not only, as I say, was there not negligence on the part of the defendant, or the crew of this shifting engine, but that there was negligence on the part of Peter B. Young, who was operating this engine. It is claimed that under the rules—and there again you must consider that under these rules Peter B. Young was bound to approach this yard limit with his engine under control—but there is evidence indicating that by his engine under control is meant his engine under such control that he could stop it within the distance which he could see; and that this accident was caused altogether by Young taking his engine, not under control, into this yard, he knowing that the yard engine, under the rules concerning which he had been examined, which it is claimed he understood, that under the rules the switch engine having the right of way, that he came into this yard without his engine under control, on a foggy morning when he could not see ahead, knowing the switch engine had the right of way and at such a rate of speed that he caused the collision. It is claimed not only therefore was there no negligence on the part of the defendant, but

that the conduct of Peter B. Young was the sole cause of the accident.

If you should find from the evidence—I am bound to say to you—that that was the sole cause of the accident, the conduct of Peter B. Young, then there could be no recovery, but your verdict would be for the defendant.

As bearing upon that also the question arises as to whether there was contributory negligence, because, as I view it, there is some difference between the position of the defendant in claiming that the conduct of Peter B. Young was the sole cause of the accident, and the question of contributory negligence. And here again is a change in the law. Formerly in the State of Pennsylvania if a person injured was guilty of any negligence contributing toward the injury, that barred a recovery; but this Act of Congress is that the negligence of one which contributes to an injury does not bar a recovery, but that the recovery shall be reduced by the amount of the negligence of the person injured contributing to the injury. Now, you see there you must take into consideration whether or not Peter B. Young was negligent, and whether his negligence contributed towards this injury. You reduce the amount that you would find in favor of the plaintiff, if the plaintiff has satisfied you by the weight of the evidence, of the negligence of the defendant, upon that proportion, if, after the examination of the evidence you find the negligence of Peter B. Young contributed. Suppose that his negligence contributed one-fourth, then you would reduce the verdict by one-fourth. Suppose it contributed by one-half or three-fourths, then by that much. Or if it was the sole cause, then the verdict would be for the defendant, and I think that is the distinction that the law intends to make.

Now, recollect that here the burden shifts, and while the burden is upon the plaintiff to establish the negligence of the defendant Company, the burden is

upon the defendant to establish the negligence of Peter B. Young. The defendant is bound to show you by the weight of the evidence that Young was guilty of contributory negligence. If you should find that there was sufficient evidence, that the weight of the evidence indicated negligence on the part of the defendant, your verdict would be for the plaintiff, but if you find—and the burden is on the defendant to establish that by the weight of the evidence—that Young's negligence contributed to the injury, then your verdict would be reduced by the amount that would bear, a proper proportion between his negligence and the negligence of the defendant; or, if his negligence was the sole cause then your verdict would be for the defendant. Therefore you recollect that you must examine the evidence in this light.

Here again you must take into consideration these rules. These rules, if properly followed, would they have prevented this accident? Was Young informed of these rules, and there has been evidence upon that? Did he go into this yard knowing these rules and did he disobey the rules? Was the shifting engine there by right upon this track; was he bound to run with caution through the yard; and all those things are to be taken into consideration by you also in determining whether or not there was contributory negligence on the part of the defendant.

Now, Gentlemen of the Jury, if you shall be satisfied by the weight of the evidence of the negligence of the defendant, and you should further not be satisfied by the evidence of the defendant, either that Peter B. Young's negligence was the sole cause, or having determined how much it contributed, you would find a verdict for the plaintiff. I have given you the alternative, if you should not be satisfied by the weight of the evidence of the negligence of the defendant, or should be satisfied by the weight of the evidence that Young's negli-

gence was the sole cause then your verdict would be for the defendant.

If you should find a verdict for plaintiff then you must proceed to consider what damages the plaintiff would be entitled to receive. Recollect here that it is compensation that the law gives to one injured; compensation; what will make the person entirely whole because of the injury. The burden is here upon the plaintiff to satisfy you by the weight of the evidence of the extent of the injury, as well as of the negligence, and that negligence resulted in the injury. You must say how much in money, because you can only estimate by dollars and cents. You must say how much in money, what amount will compensate Mrs. Young and her two children for the loss of the husband and father.

As a foundation for that you have in the first place the funeral expenses. I need not go over the figures. You will recall them. The funeral expenses, I believe they were about three hundred dollars. That is a fixed sum that you start with. To that you would add such sum as Peter B. Young would have earned for the length of time that he would have lived. That sum reduced in the first place by what it would take to keep him, and that final sum fixed at an amount which would be its present worth. Now, let me follow that just for a moment. You have as factors enabling you to determine the compensation these; the age of Mr. Young at the time of his death; his condition of health; his habits of life; his sobriety and industry, and having that factor then you determine how long a man at his age would likely live, and having that, you have another factor to assist you in your calculation, because what he was worth to his family would be measured by his wages—and you have evidence of that—by his wages measured by the length of time that he would likely earn wages, and, having arrived at that amount, you would take from it what the evidence indicates he would have spent on himself, because all that his fam-

ily would be entitled to would be what he was accustomed to give them out of his wages. Then, having arrived at that amount, you would consider that those wages would be paid to him now, or to his family, represented by this compensation, instead of being paid from week to week or month to month, and therefore it would be the present worth, that is such a sum as would yield the amount of wages that you fix upon, that he would have earned that sum yearly and to be exhausted at the end of the time. The best method I know of doing it is an annuity. Possibly some of the gentlemen on the jury know about annuities and can figure it out; but it is the present worth and the thought that is to guide you in fixing it is that it is paid now instead of being paid either from month to month or week to week or year to year. In other words, one hundred dollars a man owes you at the end of a year, if you are paid to-day is a different sum from getting it at the end of the year, represented by the interest.

I have gone over this case at some length, with the desire to give you some instructions that would guide you, which you will follow, recollecting that the evidence is all for you, and that upon you will rest the responsibility of bringing in a proper verdict.

As still further instruction I am requested by counsel for plaintiff and defendant to answer some points.

MR. KOONS: I withdraw all my points.

MR. DICKSON: I withdraw the second, seventh, eighth and ninth points.

THE COURT: The first point presented by the defendant is refused.

The third point is refused.

The fourth point is refused.

The fifth point is affirmed, which reads as follows:

"5. The plaintiff charges that the defendant failed to supply or maintain in good order, customary and

proper signal apparatus for giving warning to Young of the presence of engine 514 on his track. You are instructed that there is no evidence from which you would be justified in finding that the defendant was negligent in this respect."

"6. If you shall find from the evidence that either under the practice or the rules of the defendant railroad company yard or switching engines, while working within yard limits, customarily occupy the main tracks without any protection from a flag or other signal, then you are instructed that this constituted one of the risks of Young's employment, of which he is presumed to have knowledge, and the plaintiff cannot recover."

This is affirmed.

Counsel for defendant excepted to the refusal of the Learned Court to instruct the jury as requested in the first, third and fourth points presented by defendant.

(Exception noted for defendant by direction of the Court).

Counsel for defendant excepted to the charge of the Learned Court in which it submitted to the jury the construction of the rules.

(Exception noted for defendant by direction of the Court).

Counsel for plaintiff excepts to the affirmance by the Learned Court of the sixth point presented by defendant.

(Exception noted for plaintiff by direction of the Court).

The case is submitted to you, and you will retire to your room and consider it and bring in such verdict as is justified by the evidence.

The points presented by the defendant, which were refused by the Court and not read to the jury are as follows:

"1. Under all the evidence your verdict must be for the defendant."

"3. The plaintiff has not alleged nor proved any defect or insufficiency in the defendant company's rules and you are therefore instructed that the defendant company was not negligent in this respect."

"4. The plaintiff charges that the crew of defendant company's engine No. 514 were negligent in allowing that engine to come or be on the main track without warning to Young. You are instructed that under the defendant company's rules, the construction of which is for the Court and not for you, the crew of engine 514 acted within their rights and duty and were therefore not negligent."

Counsel for defendant requested the learned Judge to direct the stenographer to reduce the testimony and charge of the Court to typewriting, and file the same of record in the cause, which request was granted, and the stenographer was so directed.

I hereby certify that the foregoing is a true transcript of all evidence, offers of evidence and findings thereon, and the charge of the Court, taken by me on the trial of the above cause.

T. Roy Phillips,
Stenographer.

CERTIFICATE.

I, James S. Young, hereby certify that the foregoing is a true transcript of all the evidence, the offers

of evidence and the rulings thereon taken at the trial of the within cause, and that the same, so certified, is ordered to be filed of record in the case.

JAMES S. YOUNG, *J.*

March 19th, 1912.

And thereupon, the counsel for the said defendant, did then and there except to the aforesaid charge and opinion of the said Court so far as is hereinbefore stated, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the Record:

The said counsel for the said defendant did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge at the request of the said counsel for the defendant did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this fifteenth day of April, 1912.

JAMES S. YOUNG, (Seal)
Judge.

MOTION FOR NEW TRIAL AND REASONS THEREFOR.

Filed Feb. 27, 1912.

And now, to wit, this twenty-seventh day of February, 1912, the defendant by its attorney moves for a New Trial and assigns as Reasons therefor the following:

1. The verdict was against the law.

2. The verdict was against the evidence.

3. The verdict was against the weight of the evidence.

4. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in its third point, as follows:

> "3. The plaintiff has not alleged nor proved any defect or insufficiency in the defendant company's rules and you are therefore instructed that the defendant company was not negligent in this respect."

5. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in its fourth point, as follows:

> "4. The plaintiff charges that the crew of defendant company's engine No. 514 were negligent in allowing that engine to come or be on the main track without warning to Young. You are instructed that under the defendant company's rules, the construction of which is for the Court and not for you, the crew of Engine 514 acted within their rights and duty and were therefore not negligent."

6. The learned trial Judge erred in submitting to the jury the construction of the defendant company's rules in his charge as follows:

(p. 227):

> "As bearing upon the negligence you will have to take into consideration the rules of this Company, because the duty rested upon the defendant to provide rules and such rules as were reasonable and fair, and such rules as were known to the operating railroads, such rules as would be a protection for the employes.
>
> "The plaintiff has offered in evidence these rules, and has offered some interpretation of these rules, and under that interpretation he claims that it was negligence in the flagman and the engine-

man and the crew of this shifting engine to come out on that track without warning the train that was coming along that track.

"The defendant has offered these rules and certain other rules, and has offered evidence contradicting, or tending to contradict the plaintiff's evidence, and for the purpose of showing that the rules that were provided for these employes on both trains were such as to secure the safety and the protection of the persons operating the trains.

Now, we cannot make rules for the railroad, and therefore the defendant company has offered the rules which it claims are reasonable and it has offered evidence tending to show that they are rules that are in force and effect on other roads and that they are rules that are intended, if obeyed, to produce safety and to protect the employes engaged in operating trains. Therefore you must look at these rules as they have been offered in evidence. You must consider the evidence as to what they mean as offered by the plaintiff. You must consider the evidence as offered by defendant's interpretation, and then from all that, as bearing upon the question of negligence, determine it."

(pp. 227, 228):

"The plaintiff claims that these rules properly interpreted, would allow the train which Mr. Young was acting as engineer of, to proceed through this yard at a rate of speed, and that the responsibility of keeping out of the way was on the shifting engine; while the defendant claims that under these rules—and therefore you have heard the evidence of the signalmen as to the interpretation of this rule 107 especially—that if that rule were followed there was no occasion for an accident. This evidence also bears upon the question of contributory negligence, of which I shall shortly speak."

(p. 229):

"The defendant says not only was there no negligence on its part, but that these rules provide

for the safety of the crew that was running this train, and all the persons engaged there in operating the road. And the defendants say that not only, as I say, was there not negligence on the part of the defendant, or the crew of this shifting engine, but that there was negligence on the part of Peter B. Young, who was operating this engine. It is claimed that under the rules—and there again you must consider that under these rules Peter B. Young was bound to approach this yard limit with his engine under control—but there is evidence indicating that by his engine under control is meant his engine under such control that he could stop it within the distance which he could see; and that this accident was caused altogether by Young taking his engine, not under control into this yard, he knowing that the yard engine, under the rules concerning which he had been examined, which it is claimed he understood, that under the rules the switch engine having the right of way, that he came into this yard without his engine under control, on a foggy morning when he could not see ahead, knowing the switch engine had the right of way and at such a rate of speed that he caused the collision."

(p. 231):

"Here again you must take into consideration these rules. These rules, if properly followed, would they have prevented this accident? Was Young informed of these rules, and there has been evidence upon that? Did he go into this yard knowing these rules and did he disobey the rules? Was the shifting engine there by right upon this track; was he bound to run with caution through the yard; and all those things are to be taken into consideration by you also in determining whether or not there was contributory negligence on the part of the defendant."

A. G. Dickson,
for Defendant.

MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO.
Filed Feby. 27, 1912.

And now, to wit: this 27th day of February, 1912, the Court having declined defendant's point requesting binding instructions, the defendant, Central Railroad Company of New Jersey, by its counsel, Arthur G. Dickson, Esq., moves the Court to have all of the evidence taken upon the trial of the above cause duly certified and filed, so as to become a part of the record, and for judgment *non obstante veredicto* upon the whole record.

A. G. Dickson,
For defendant.

OPINION.
Filed Apr. 4, 1912.

Young, *J.*:

This is a motion for judgment for defendant *non obstante veredicto*, the verdict having been for the plaintiff upon the trial of the case. The facts necessary to an understanding of the case are as follows: Plaintiff's decedent, Peter B. Young, was engineer of extra freight train No. 184, and was proceeding over the line of the railroad on October 9, 1909, and at about eight o'clock in the morning collided with yard engine No. 514. When engine 184 came within the yard limits the automatic block signal No. 962 showed clear, which indicated to the deceased engineer that the track was unoccupied, but as the engine proceeded over a distance of about 3062 feet there came out upon the track in front of engine 184 the yard engine 514, with which engine 184 collided resulting in the death of plaintiff's

decedent. The evidence shows that engine 184 was proceeding at a rate of from 18 to 25 miles an hour and was not under such control that it could be stopped within seeing distance, the morning being dark and foggy and a view not being possible beyond about four car lengths. The evidence shows that the yard engine at the point of collision had crossed from the west to the east main track, being the track upon which engine 184 was moving, without any notice, signal or precautions being taken to prevent a collision with engine 184. After engine 184 collided with engine 514, the deceased engineer did not put on the brakes and the two engines, pilot to pilot, ran for a distance of 985 feet, when engine 184 became derailed and the engineer was killed by the cars piling up on top of him.

The negligence alleged was the failure of the crew of yard engine 514 in bringing that engine onto the main track without taking any precautions to avoid a collision with engine 184. Both plaintiff and defendant offered in evidence rules 107, 99 and 99 A of the defendant company. The defendant, under rule 107, which is as follows:

> "Yard limits will be indicated by yard limit boards. Within these limits yard engines may occupy main tracks protecting themselves against scheduled trains. Extra trains must run through yards under control looking out for yard engines and other extras"—

asked for binding instructions upon the ground that yard engine 514 had the right to occupy the main track over extra 184 without taking any precautions as to other trains except scheduled trains moving over the main track; in short, that the defendant by this rule was relieved of the duty of exercising ordinary care in avoiding collisions with extra trains entering the yard. We do not understand such to be the law. We understand the correct rule to be that laid down in Southern Railway Co. v. Craig, 113 Fed. Rep. 76, as follows:

"We find no error in the modifications made by the court in giving the instructions requested. After giving the first instruction requested, the court simply said, in substance, that it was the duty of the switching engine to exercise ordinary care in avoiding collisions with trains entering the yard. We cannot conceive of any circumstances under which the operators of a railroad train are relieved from the use of ordinary care to prevent collisions with other trains. This is a duty that devolves upon those running and operating trains at all times. What constitutes ordinary care depends upon the relationship of the parties and the circumstances under which they act, and what would be ordinary care or common prudence under certain conditions would not be under others. It would certainly be incumbent upon the operator of a switching engine moving in a railroad yard, where regular and extra trains are coming and going, to observe a greater degree of caution on a dark, foggy night, when sounds are less distinct, and signals more difficult to be seen, than on a clear night, when such conditions do not prevail; and we therefore think that the second instruction requested, as modified by the court to the jury, was also properly given."

While it was certainly the duty of Young to run through the yard with his engine under control, looking out for yard engines and other extras, the crew of the yard engine was bound to exercise ordinary care to avoid collision with trains entering the yard and to take proper precautions against collision with trains entering the yard, the character of these precautions to be determined by the circumstances of the day, the heavy fog and the difficulty in hearing and seeing signals.

Under the evidence in this case we are of opinion that it was one for the jury and that the Court would have been in error to have taken it from the jury. The real question in the case, it seems to us, was the ques-

tion of contributory negligence. There was evidence in the case which was submitted to the jury from which the jury could have found that the negligence of the engineer of train 184 contributed almost entirely to the injury and that evidence was submitted by the Court to the jury with instructions to determine to what extent his negligence contributed and if they found that his negligence was the sole cause of the accident then that their verdict should be for the defendant.

The motion for judgment for defendant *non obstante veredicto* must be refused, as also the motion for a new trial.

And now, April 4, 1912, the motion for a new trial is refused.

Per CURIAM,
By JAMES S. YOUNG,
Judge.

ORDER FOR JUDGMENT.

And now, April 4, 1912, the motion for judgment for defendant *non obstante veredicto* is overruled and the Clerk is directed to enter judgment for plaintiff upon the verdict.

Per CURIAM,
By JAMES S. YOUNG,
Judge.

EXCEPTION.

Eo die, counsel for defendant excepts to the action of the Court in refusing judgment for defendant *non obstante veredicto* and in entering judgment for plaintiff upon the verdict and at his instance exception noted and bill sealed.

JAMES S. YOUNG,
Judge.

JUDGMENT.
Filed Apr. 4, 1912.

Before YOUNG, *J.*

And now, to wit, this 4th day of April, 1912, in accordance with the opinion of the Court filed in the above case, judgment is hereby entered on the verdict in the above entitled case in favor of the plaintiff and against the defendant in the sum of Five thousand four hundred and thirty ($5430.00) Dollars.

Attest:

LEO A. LILLY,
Deputy Clerk.

ASSIGNMENTS OF ERROR.
Filed Apr. 20, 1912.

1. The learned trial Judge erred in refusing the defendant's first point, which was as follows:

> "1. Under all the evidence your verdict must be for the defendant."

2. The learned trial Judge erred in refusing the defendant's third point, which was as follows:

> "3. The plaintiff has not alleged nor proved any defect or insufficiency in the defendant company's rules and you are therefore instructed that the defendant company was not negligent in this respect."

3. The learned trial Judge erred in refusing the defendant's fourth point, which was as follows:

> "4. The plaintiff charges that the crew of defendant company's engine No. 514 were negligent in allowing that engine to come or be on the main track without warning to Young. You are instructed that under the defendant company's

rules, the construction of which is for the Court and not for you, the crew of Engine 514 acted within their rights and duty and were therefore not negligent."

4. The learned trial Judge erred in submitting to the jury the construction of the defendant company's rules in his charge as follows:

"As bearing upon the negligence you will have to take into consideration the rules of this Company, because the duty rested upon the defendant to provide rules and such rules as were reasonable and fair, and such rules as were known to the operating railroads, such rules as would be a protection for the employes.

"The plaintiff has offered in evidence these rules, and has offered some interpretation of these rules, and under that interpretation he claims that it was negligence in the flagman and the engineman and the crew of this shifting engine to come out on that track without warning the train that was coming along that track."

"The defendant has offered these rules and certain other rules, and has offered evidence contradicting, or tending to contradict the plaintiff's evidence, and for the purpose of showing that the rules that were provided for these employes on both trains were such as to secure the safety and the protection of the persons operating the trains.

Now, we cannot make rules for the railroad, and therefore the defendant company has offered the rules which it claims are reasonable and it has offered evidence tending to show that they are rules that are in force and effect on other roads and that they are rules that are intended, if obeyed, to produce safety and to protect the employes engaged in operating trains. Therefore you must look at these rules as they have been offered in evidence. You must consider the evidence as to what they mean as offered by the plaintiff. You must consider the evidence as offered by defendant's interpretation, and then

from all that, as bearing upon the question of negligence determine it." * * * *

"The plaintiff claims that these rules properly interpreted, would allow the train which Mr. Young was acting as engineer of, to proceed through this yard at a rate of speed, and that the responsibility of keeping out of the way was on the shifting engine; while the defendant claims that under these rules—and therefore you have heard the evidence of the signalmen as to the interpretation of this rule 107 especially—that if that rule were followed there was no occasion for an accident. This evidence also bears upon the question of contributory negligence, of which I shall shortly speak." * * * *

"The defendant says not only was there no negligence on its part, but that these rules provide for the safety of the crew that was running this train, and all the persons engaged there in operating the road. And the defendants say that not only, as I say, was there not negligence on the part of the defendant, or the crew of this shifting engine, but that there was negligence on the part of Peter B. Young, who was operating this engine. It is claimed that under the rules—and there again you must consider that under these rules Peter B. Young was bound to approach this yard limit with his engine under control—but there is evidence indicating that by his engine under control is meant his engine under such control that he could stop it within the distance which he could see; and that this accident was caused altogether by Young taking his engine, not under control into this yard, he knowing that the yard engine, under the rules concerning which he had been examined, which it is claimed he understood, that under the rules the switch engine having the right of way, that he came into this yard without his engine under control, on a foggy morning when he could not see ahead, knowing the switch engine had the right of way and at such a rate of speed that he caused the collision." * * * *

"Here again you must take into consideration these rules. These rules, if properly followed, would they have prevented this accident? Was Young informed of these rules, and there has been evidence upon that? Did he go into this yard knowing these rules and did he disobey the rules? Was the shifting engine there by right upon this track; was he bound to run with caution through the yard; and all those things are to be taken into consideration by you also in determining whether or not there was contributory negligence on the part of the defendant."

5. The learned trial Court erred in refusing to enter judgment *non obstante veredicto* for the plaintiff in error on the whole record. (The motion for judgment *n. o. v.* did not itself state any reasons, but in support of the Motion it was urged *First*, that under the rules of the defendant railroad company, engine 514 had the right to be on the east-bound main track, within the limits of Siegfried yard, without warning or protection by flags, torpedoes or otherwise, to extra train 184, which was being operated by plaintiff's decedent, said rules throwing upon the engineer of extra train 184 the duty of running through the yard under control and thus avoiding collisions with yard engines or other extras; *Second*, that the defendant company's rules were the standard rules of the American Railway Association and that the defendant company could not be held guilty of negligence in having adopted said rules for the operation of its road, and *Third*, that under the rules and the evidence in the case, the finding of a yard engine on the main tracks, in yard limits, was one of the risks of the employment of plaintiff's decedent which he must be held to have assumed.)

6. The learned trial Court erred in entering judgment for the plaintiff below.

A. G. Dickson,
Atty. for defendant.

PRAECIPE SUR TRANSCRIPT.
Filed Apr. 20, 1912.

Clerk of said Court:

In making up the Transcript of Record sur Writ of Error, you are to include the following papers and no others:

1. Statement of Claim
2. Amendment to Statement of Claim
3. Plea
4. Motion for Judgment *n. o. v.*
5. Motion and reasons for New Trial
6. Opinion of the Court
7. Bill of Exceptions
8. Precipe for Judgment—Judgment
9. Assignments of Error
10. Docket Entries.

A. G. DICKSON,
Attorney for defendant.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA. } *sct.*

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of Pleas and Proceedings in the case of Martha Young, Administratrix of the Estate of Peter B. Young, deceased, v. Central Railroad Company of New Jersey, No. 1538, October Session, 1911, as per praecipe filed a copy of which is hereto attached, now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this 10th day of May in the year of our
(SEAL) Lord one thousand, nine hundred and twelve and in the one hundred and 36th year of the Independence of the United States.

WILLIAM W. CRAIG,
Clerk District Court U. S.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1912.

No. 1632.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, Plaintiff in Error,
vs.
MARTHA YOUNG, Administratrix of the Estate of Peter B. Young, Dec'd, Defendant in Error.

And afterwards, to wit, on the eighth day of October, 1912, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John B. McPherson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the eleventh day of November, 1912, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1912.

No. 25.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, Plaintiff in Error,
v.
MARTHA YOUNG, Administratrix of the Estate of Peter B. Young, Deceased, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Gray, Buffington, and McPherson, Circuit Judges.

GRAY, *Circuit Judge:*

The plaintiff below was Martha Young, Administratrix of the estate of Peter B. Young, deceased, and the defendant below was the Central Railroad Company of New Jersey.

The proceeding was a suit in trespass, to recover for the damages sustained by reason of the death of plaintiff's decedent, alleged to have been caused by the negligence of the defendant.

Peter B. Young, plaintiff's decedent, was an engineer in the employ of the defendant company, and at the time of the occurrences in question, was in charge of an engine hauling extra freight train No. 184 of that company, bound eastward from Haucks, Pennsylvania, to Jersey City, New Jersey. The morning was foggy, so that it was not possible to see in any direction further than three or

four car lengths,—that is, from 90 to 120 feet. As Young's train entered the defendant company's yard at Siegfried, Pennsylvania, it was running, with steam shut off, at a speed of from 18 to 20 miles an hour, at which speed it could not have been stopped within view of any obstacle on the track. As this extra freight train came within the yard limits, the automatic block signal No. 962 showed clear, which indicated to the engineer that the track in front or to the east of him was at that time unoccupied. Shortly after the train passed this block signal, engine No. 514, then on duty as a yard engine, crossed over from the west bound main track to the east bound main track, on which Young's train was running, the cross over switch being 3,062 feet east of block Signal No. 962. Yard engine No. 514 had barely reached the east bound track and was backing eastward, at six to eight miles an hour, when it was overtaken and run into by Young's engine hauling the extra freight No. 184, and was driven backwards down the east bound track 1985 feet, when the engine of extra No. 184 became derailed. Thereupon, the engineer, plaintiff's decedent, jumped and was killed by the cars behind him piling up on him. The engine remained upright, and the fireman who stuck to his post was uninjured.

When the crew of yard engine No. 514 set the switches for the cross over movement, they saw and heard nothing of the approach of Young's train, which had not whistled at the whistling post 745 feet west of the cross over, and they started to make the cross over movement in reliance upon rule No. 107, promulgated by the defendant company, among other rules, for the government of trains, regular and extra, passing through railroad yards.

This rule provides:

"Yard limits will be indicated by yard limit boards. Within these limits, yard engines may occupy main tracks, protecting themselves against scheduled trains. Extra trains must run through yards under control, looking out for yard engines and other extras."

It is admitted that the crew of yard engine No. 514, after making the cross over, gave no signal or other warning of its presence on the east bound track. The setting of the cross over switches would have brought the block signal to the danger position, if it had not already been brought to that position by the passage of Young's train. The block signals were tested after the accident, and found in good working order, and the evidence conclusively established that they were properly placed and in accordance with standard railroad practice.

Witnesses from the New York Central, the Interborough Rapid Transit of New York, the New York, New Haven & Hartford Railroad, and the Baltimore & Ohio Railroad Companies testified to rules and practice on their roads, in reference to yard limits, similar to that of the defendant company. The rules of the Philadelphia & Reading Company were shown to be identical with those of the defendant company, and it was further established that rule No. 107 is a standard rule of the American Railway Association and in force on the principal railroads of the country. At the conclusion of the testimony, on the ground that under rule No. 107 the crew of yard engine 514 were not negligent in failing to put out flags, torpedoes or

other signals for the extra freight train No. 184, and also on the ground that the presence of the yard engine on the main track was one of the risks of employment of plaintiff's decedent which he must be held to have assumed, defendant's counsel requested binding instructions for a verdict in favor of the defendant. The court below refused this request, and submitted to the jury the construction of the rules, and whether the crew of yard engine No. 514 were negligent. The jury brought in a verdict for the plaintiff, and the defendant thereupon made a motion for judgment, non obstante veredicto, as well as a motion for a new trial. Both motions were refused, the court holding that "while it was certainly the duty of Young to run through the yard with his engine under control, looking out for yard engines and other extras, the crew of the yard engine was bound to exercise ordinary care to avoid collision with trains entering the yard, and to take proper precautions therefor, the character of these precautions to be determined by the circumstances of the day, the heavy fog, and the difficulty in seeing and hearing signals."

Counsel for the plaintiff, in the brief submitted to us, quotes from the opinion of the court in Little Rock & M. R. Co. v. Barry (84 F. R. 944), cited by plaintiff in error, the following language of the court:

"The skilled experienced railroad operators who seem to have developed these rules, are undoubtedly more competent than jurors or judges to select and prepare rules conducive to the safe, economical and prosperous operation of railroads."

He then says: "As a general proposition of law, this is not for a moment questioned, and though plaintiff's original statement of claim averred that the defendant company did not have proper rules, plaintiff's amended statement of claim specifically struck out the averment as to failure of proper rules and inserted in lieu thereof the allegation, that the crew of No. 514 were negligent in not giving warning of their presence on the east bound main track to Young and his crew." Nevertheless, the position of the court below, as well as the whole trend of plaintiff's argument, is that, though rule 107 properly imposed the duty upon the engineer of the extra train to run through the yard under control, properly interpreted, it either was not meant to relieve the crews of yard engines from the duty of protecting themselves against extra freight trains running within yard limits, or, if it were so meant, the rule was unreasonable.

The questions, then, are, first, what interpretation is to be given to the rule; and second, if it is to be interpreted as being applicable to and as having governed the conduct of the crew of the yard engine on the occasion of this accident, was the promulgation of the rule a sufficient and proper exercise of care and prudence on the part of the defendant in the premises?

There is no difficulty in gathering the meaning of rule 107 as applicable both to extra trains passing through yard limits and to yard engines. It was evidently meant to relieve the crews of yard engines in their constant and necessary movements to and fro, within yard limits, from the necessity of protecting themselves from

extra trains passing through such limits, by imposing the absolute duty upon those in charge of said trains, of so running them after entering a yard as to be at all times within control. This rule, thus interpreted, was shown by uncontradicted testimony to have been in force on the principal railroads of the country, and to have been established as a standard rule of the American Railway Association. The practical benefit resulting from operation under it, is obvious. The movements of these drilling or yard engines is so constant, and the attention of their crews to the work in hand so exigent, that a measurable relief from the necessity of protecting themselves while moving on main tracks, would tend to lessen or minimize the distractions of their constantly changing work, and thus make in the direction of safety. Therefore, they are told by this rule that they must protect themselves against scheduled trains, but that they are not required to do so with respect to extra trains passing through yard limits, it being made the duty of the crews, and especially of the engineers of such trains, to run the same under control which means, as said by one of the expert railroad witnesses, that the engineman must at any time be able to bring the train to a stop within vision of what he can see ahead of him on the track. By this rule, the engineman and conductor of extra trains are told that the responsibility of avoiding collision with what may be ahead of him on the track, within the yard limits, is solely upon themselves.

As was said by the circuit court of appeals for the second circuit, in Rosney v. Erie R. R. Co., 135 Fed. Rep. 311, in regard to such a rule, "the extra freight train has no right to expect a flagman to give warning of the presence of the switching train on the main track." The absence of a flagman, torpedo or other warning does not indicate a clear track through the yard, and the engineer of the extra train is required to take notice that there may be another engine on the track ahead of him. It is easy to see how, if the rule were otherwise, and there was, as was said by the court below, a duty upon the yard engine to take "proper precautions" to avoid collision with extra trains entering the yard, the safety of operations within the yard would be diminished rather than enhanced. The engineer of the oncoming extra train could hardly fail to rely in some degree (probably in a large degree) upon such precautions, to give him notice of a train or engine on the track ahead of him, and would or might insensibly relax his own vigilance; and such is the opinion of the railroad experts on the effect of the rule in question.

In Little Rock & M. R. Co. v. Barry (supra), Judge Sanborn, in delivering the opinion of the circuit court of appeals for the eighth circuit, says, with reference to the facts in that case:

"It does not seem unreasonable to suppose that men who are warned that other trains will pass over the railroad on which they are operating, without notice to them, and that they must watch for and protect themselves against them at all times, would operate their trains with more care and fewer accidents than they would if an attempt were made to notify them of the whereabouts and movements of all trains, in view of the fact that the expectations of such

notice might relax their vigilance, and that they would often be in locations where it would be impossible to give them the notices. If experience has proved this supposition to be in accordance with the fact, and has led to the adoption of rules which do not require, but discountenance such notices, because the habit of giving them has been found to increase the number and danger of accidents, as the adoption of these standard rules by so many railroad companies, and the testimony of the experienced witnesses who are operating railroads under them, tend to show, it cannot be said that it was the duty of the defendant to give these notices, nor that its failure to give them was negligence."

When a railroad has adopted a system of rules which have been made familiar to its employés, and its railroad is operated under them with success, in the absence of any conflict of expert testimony on the question of their reasonableness and sufficiency, that question is not to be submitted to the varying determination of juries, as a question of fact, but must be determined as a question of law. This is the position of the court of appeals in the case just cited, and is supported by many well considered cases in the state and federal courts.

In the comparatively recent case of Chicago, R. I. & P. Ry. Co. vs. Ship, 174 F. R., 353, the circuit court of appeals for the eighth circuit, in discussing a rule of the defendant company almost identical in language and identical in meaning with the rule 107, with which we are here concerned, says:

"As in the case of Great Northern Ry. Co. v. Hooker, (supra), decided by this court, so in this case, the court (below) seem to leave the interpretation of the rules above mentioned to the jury as a matter of fact. In reference to this practice, the language used by Judge Van Devanter (now Mr. Justice Van Devanter) in the case last cited, is pertinent:

"'The trial court treated the interpretation of the rules prescribing the plaintiff's duty in the premises as a question of fact to be determined by the jury. But we are of opinion that it was a question of law to be determined by the court. Not only were the rules in the nature of a written instrument, but they contain no terms, the meaning of which was not made plain by them; and this being so, effect should have been given to the general rule that the interpretation of a written instrument rests with the court and not with the jury. Bell v. Bruen, 1 How. 169, 183 (11 L. Ed. 89); Goddard vs. Foster, 17 Wall. 123, 143 (21 L. Ed. 589); Higgins v. McCrea, 116 U. S. 671, 682 (6 Sup. Ct. 557, 29 L. Ed. 764); Scanlan v. Hodges, 52 Fed. 354, 3 C. C. A. 113; Bowes v. Shand, L. R. 2 App. Cas. 455; 1 Labatt, Master and Servant, Sec. 215. Moreover, it is held by this court that the reasonableness of such rules is to be determined by the court as a question of law, and not by the jury as a question of fact. Kansas, etc. Co. v. Dye, 70 Fed. 24, 16 C. C. A. 604; Little Rock, etc. v. Barry, 84 Fed. 944, 28 C. C. A. 644, (43 L. R. A. 349). See also Scott v. Eastern Ry. Co., 90 Minn., 135, 95 N. W. 892; Bailey's Personal Injuries, Sec. 3325. And it would

seem that by analogy a like holding should be made when the question is one of interpretation.' "

We think the court below, therefore, construed rule 107 too narrowly, confining its meaning to the injunction laid upon the engineer of the extra train. It has, as we have seen, a wider scope, and was intended to facilitate the operations of yard engines and to protect them more surely, and extra trains as well, by not only commanding the engineer of an extra train to run the same under control, but, by quickening and stimulating his caution in that respect, by giving him no right to expect warnings of any kind from yard engines ahead of him.

It is urged, however, that while this might be the case under ordinary conditions, in which objects could be seen at considerable distance, the fog prevailing on the morning of the accident was an unusual condition, owing to which the range of vision was not more than from 90 to 120 feet, and that therefore, the crew of yard engine 514 should have taken precautions with reference thereto. This condition of fog, however, imposed upon plaintiff's decedent still more emphatically the duty of keeping his train under control. In the testimony of one of the expert railroad witnesses, Signal Engineer of the New York Central and Hudson R. R., we find the following:

"Q. What do you understand running under control to be?

A. To enable the engineman to bring the train to a stop within vision.

Q. Within vision?

A. Yes.

Q. Within vision of what?

A. Of what he can see ahead of him on the track.

Q. And if his vision is limited to three or four car lengths by conditions of the weather, does that have any effect upon the rate of speed at which he may run?

A. It does. He must run no faster than he can stop within the space ahead in which he can see.

Q. Is that the practice and construction of the rules of your railroad?

A. Yes."

Of course, the extent of the range of vision must necessarily be reckoned with in controlling the speed of the train subject to the rule. An extra freight must, in yard limits, be kept within the control of the engineer, whether the range of vision be large or small, and the rule which exempted the yard engine from the necessity of protecting itself by warnings, was not affected by the range of vision due to the conditions of the weather. It is as easy to run "under control" in conditions of fog, as in clear weather.

It is not hard to see what confusion and uncertainty might result from committing to the crews of yard engines the discretion as to when weather conditions did or did not require that they should protect themselves from extra freight trains, by flag, whistles, torpedoes, or other warnings, with the resulting necessity of submitting to the variant judgment of juries the determination whether, in any

given case, the absence of such warnings was evidence of negligence on the part of those in control of such engines.

In Rosney v. Erie R. R. Co. (supra), dealing with the effect and operation of such a rule as we are here concerned with, the circuit court of appeals for the second circuit thus expresses itself:

"A first class train seeing no flag could run through at regulation speed, but all other trains were required to slow down and proceed under perfect control. Some of the additions and amendments suggested by counsel are plainly impracticable and have been criticized and rejected by the courts. If the defendant had attempted to make a rule to cover all possible contingencies—such a condition, for instance, as existed on the morning in question, with falling snow and slippery tracks—it would have resulted, as such attempts generally do, in lamentable failure. An elaborate system of signals by ringing bells, sounding whistles, swinging lanterns and waving flags, designed to cover the erratic movements of switching engines and extra freight trains, would quite likely have tended to complicate and confuse the situation.

"In Aerkfetz v. Humphries, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, the Supreme Court says:

'The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. * * * It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employés who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendant.'

To the same effect are Maher v. Railway, 106 Fed. 309, 45 C. C. A. 301; Southern Railway v. Craig, 113 Fed. 76, 51 C. C. A. 53; Morgan v. Hudson River Railroad, 133 N. Y. 666, 31 N. E. 234; Berrigan v. N. Y., L. E. & W. R. Co., 131 N. Y. 582, 30 N. E. 57; Little Rock v. Barry, 84 Fed. 944, 28 C. C. A. 644, 43 L. R. A. 349.

"Counsel for plaintiff has shown great industry in collecting authorities bearing upon the duties of the master to his employés, but we think that none of them would have justified the trial court in holding that the yard rule was inadequ-te or improper, or in submitting the question of its inadequacy to the jury. There was nothing to show that the rule had been ineffectual in the past."

The action in this case was brought under the Employers Liability Act of Congress, of April 22nd, 1908, which imposes upon common carriers by railroad, "liability for the injury or death of any employé resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier." It is conceded on all hands, that the object of this legislation was to abrogate the doctrine of fellow servant in the case of injuries to employés. But the negligence "of the officers, agents, or employés" is in all cases the negligence of the defendant common carrier. It is not necessary, therefore, to consider separately the point made by the counsel for plaintiff in error, that under the rules and the evidence in the case, the finding of the yard engine on the main tracks, in yard

limits, was one of the risks of employment of plaintiff's decedent, which he must be held to have assumed. If the presence of the yard engine on the track under the circumstances testified to was not to be imputed as negligence to the defendant, plaintiff's decedent of course assumed the risk thereof. If, however, its presence there, without warning, was negligence on the part of the defendant, there could be no such assumption of risk, as a servant never assumes the risk of his master's negligence.

It remains only to consider the contention of plaintiff's counsel, that whatever view might be taken of the sufficiency and reasonableness of this rule, there was evidence to show that it was not adhered to in practice. This contention rests upon the testimony of a single witness, a discharged brakeman, who testified that he had run through this or other yards on extra freights and had for a short time been one of the crew on a yard engine; that in his experience, trains frequently ran through the yard, without regard to the conditions of the weather, at the speed attributed to the extra freight on the morning of the accident; also, that yard engines were frequently protected at cross overs by flag or light in the rear of the engine or by a flagman. There was no other testimony upon this point, nor was there any evidence bringing home these departures from or infractions of rule 107 to the knowledge of officers in control of yard operations. It is well settled, upon both reason and authority, that, where there is no evidence showing an established usage of departing from a rule on the part of those whose conduct is regulated thereby, acquiesced in by their superior officers, such rule is not abrogated nor its operation waived. Mere disobedience, at times, of such a rule, by those whom it is intended to govern, without knowledge or acquiescence of superior officers, is not sufficient to take this case to the jury. Among the cases cited in support of this position by the counsel for the defendant, we cite the following:

Memphis & Charleston R. R. Co. v. Graham, 94 Ala., 545.
Francis v. Ry. Co., 110 Mo. 396.
R. R. Co. v. Mothershed, 110 Ala., 143.
Loranger v. Ry. Co. 104 Mich. 80.
Sloan v. Ry. Co. 86 Ga. 15.
Erie R. R. Co. v. Kane, 118 Fed. 223.

In the view here taken, of the intent and meaning of rule 107, as sanctioned by the practice of well conducted railroads, we are prepared to say that no negligence had been shown on the part of the crew of yard engine 514, in not protecting itself against the oncoming extra freight train 184, by flag, torpedo, or other warning. It was within the intent and reason of the rule that the plaintiff's decedent should not expect such a warning in his passage through the yard limits. As no negligence on the part of the crew of yard engine 514, with reference to the accident, was shown by the evidence, no question in that regard should have been submitted to the jury.

The judgment non obstante veredicto, moved by defendant, should

have been granted. The judgment below is therefore reversed, and judgment in favor of defendant is hereby directed to be entered.

Endorsed: No. 1632. Opinion of the Court by Gray, J. Received and Filed Nov. 11, 1912. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1912.

No. 1632 (List No. 25).

CENTRAL RAILROAD COMPANY OF NEW JERSEY, Plaintiff in Error,
vs.
MARTHA YOUNG, Admx., Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs, and the District Court ordered to enter judgment in favor of defendant.

GEO. GRAY,
Circuit Judge.

Philadelphia, November 11, 1912.

Endorsed: No. 1632. Order reversing judgment. Received and Filed Nov. 11, 1912. Saunders Lewis, Jr., Clerk.

United States Circuit Court of Appeals for the Third Circuit.

MARTHA YOUNG, Administratrix of the Estate of Peter B. Young, Deceased, Plaintiff in Error,
vs.
CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant in Error.

Assignments of Error.

And now, to wit, this 19th day of November 1912, comes Martha Young, Administratrix of the estate of Peter B. Young, Deceased, Plaintiff in Error, and makes and files these her Assignments of Error:

First. The Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the District Court for the Eastern District of Pennsylvania.

Second. The Circuit Court of Appeals for the Third Circuit erred

in directing the said District Court to enter judgment in favor of the defendant.

Third. The Circuit Court of Appeals for the Third Circuit erred in not affirming the judgment of the said District Court.

Fourth. The Circuit Court of Appeals for the Third Circuit erred in re-examining the facts found by the jury in the said District Court and embodied in the judgment entered by that Court, by a method otherwise than according to the rules of the common law, which said act of the Circuit Court of Appeals was in violation of the Seventh Amendment to the Constitution of the United States.

(Signed) ULYSSES S. KOONS,
Attorney for Plaintiff in Error.

United States Circuit Court of Appeals for the Third Circuit.

MARTHA YOUNG, Administratrix of the Estate of Peter B. Young, Deceased, Plaintiff in Error.

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY, Defendant in Error.

Petition for Writ of Error.

To the Honorable the Justices of the Supreme Court of the United States:

Martha Young, Administratrix of the Estate of Peter B. Young, Deceased, the above plaintiff in error, feeling herself ag-rieved by the final judgment entered against her in the above-entitled case on the 11th day of November, 1912, by the Circuit Court of Appeals for the Third Circuit, which judgment reversed a judgment of the District Court of the United States for the Eastern District of Pennsylvania, entered in her favor in the same case on April 4, 1912, and directed judgment to be entered in favor of the Central Railroad Company of New Jersey, comes now by her attorney, Ulysses S. Koons, Esq., and shows that the above-named action was begun in the District Court of the United States for the Eastern District of Pennsylvania; that the jurisdiction of such District Court was not dependent entirely upon the opposite parties to the suit being citizens of different states, but that the suit arose under a law of the United States; and that petitioner is, therefore, entitled to a writ of error out of the Supreme Court of the United States in accordance with Section 241 of the Judicial Code. Petitioner, therefore, prays that a write of error may be allowed to the Supreme Court of the United States, and also that an order be made fixing the amount of security for costs which the plaintiff in error shall give and furnish upon said writ of error, and that, upon giving said security, all further proceedings in this Court be suspended and stayed until the final determination of said writ of error by the Supreme Court of the United States.

And your Petitioner will ever pray.

(Signed) MARTHA YOUNG.

STATE OF PENNSYLVANIA,
County of Carbon, ss:

Martha Young, being duly sworn according to law, deposes and says that she is the plaintiff in error in the foregoing case and petition, that the statements contained in the petition are true, and that the writ of error therein prayed for is not taken out for the purpose of delay, but because she feels that an injustice has been done by reason of said judgment.

(Signed) MARTHA YOUNG.

Sworn to and subscribed before me this 18th day of November, A. D. 1912.

[SEAL.] DOUGLAS CRAIG,
Notary Public.

My Commission expires February 23 A. D. 1913.

And now, this 19th day of November, A. D. 1912, upon consideration of the foregoing petition and affidavit, and upon motion of Ulysses S. Koons, Esq., Attorney for the Plaintiffs in error, and upon filing this petition for a writ of error and assignment of errors, it is ordered that writ of error be, and it hereby is, allowed, to have review in the Supreme Court of the United States of the judgment entered herein and all the record, proceedings, etc., of the case and in any wise thereto pertaining, and that a citation be issued addressed as prayed for, returnable within 30 days, hereafter, upon the entry of security in the sum of $250 Dollars, that a supersedeas be granted and proceedings stayed upon this writ of error.

By the Court.

JOHN B. McPHERSON,
Circuit Judge.

In the Circuit Court of Appeals of the United States for the Third Circuit.

MARTHA YOUNG, Adm'x of the Estate of Peter B. Young,
vs.
CENTRAL RAILROAD OF NEW JERSEY.

Know all men by these presents, That Martha Young, Administratrix of the Estate of Peter B. Young, and Fidelity & Deposit Co. of Maryland, — held and firmly bound unto Central Railroad of New Jersey, their executors, administrators, or assigns, in the sum of Two Hundred and Fifty and no/100 dollars, lawful money of the United States of America, to be paid unto the said Central Railroad of New Jersey, their executors, administrators, or assigns, to which payment well and truly to be made. We do bind and oblige ourselves, our heirs, executors, and administrators, joint- and severally by these presents.

Sealed with our seals and dated this 20th day of November, A. D., 1912.

Whereas, the above named Martha Young, adm'x Estate of Peter B. Young, heretofore a citizen of the State of Pennsylvania, commenced an action in the District Court of the United States, in and for the Eastern District of Pennsylvania, against the said Central Railroad of New Jersey.

Now therefore the condition of this obligation is such that if the above named Martha Young in the said action shall pay on demand, all costs that may be adjudged, or awarded against Martha Young, as aforesaid in said action; then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Signature of Appellant waived by Surety.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
HERMAN HOOPES,
Resident Vice-President.

Attest:

E. HILL, *Resident Assistant Secretary.*

Sealed and Delivered in the Presence of

——— ———.

Approved Nov. 20, '12.
JOHN B. McPHERSON, *Judge.*

Endorsed: No. 1632. Bond for costs. Received and Filed November 20, 1912. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals, before you, or some of you, between Martha Young, Administratrix of the Estate of Peter B. Young, Deceased, Plaintiff in Error, and Central Railroad Company of New Jersey, Defendant in Error, a manifest error hath happened, to the great damage of the said Martha Young, as by her complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same within thirty days, in the said Supreme Court of the United States, at the City of Washington, District of Columbia, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of

the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 20th day of November, in the year of our Lord one thousand nine hundred and twelve.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk United States Circuit Court of Appeals for the Third Circuit.

Allowed by the Court,
JOHN B. McPHERSON, *Judge.*

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court, in the case of Central Railroad Company of New Jersey, Plaintiff in Error, and Martha Young, Administratrix of the Estate of Peter B. Young, Deceased, No. 1632, October Term, 1912, on file, and now remaining among the records of said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 21st day of November, in the year of our Lord one thousand nine hundred and twelve, and of the Independence of the United States the one hundred and thirty-seventh.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Central Railroad Company of New Jersey, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, within thirty days, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the United States, wherein Martha Young, Administratrix of the Estate of Peter B. Young, Deceased, is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in the said

writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Judge of the Supreme Court of the United States, at Philadelphia, the 20th day of November, in the year of our Lord one thousand nine hundred and twelve.

JOHN B. McPHERSON, *Judge.*

Service accepted.

A. G. DICKSON,
For Central Railway Co. of New Jersey.

Nov. 25th, 1912.

[Endorsed:] Martha Young, Adm'r'x, vs. Central Railroad Co. of N. J. Citation.

Endorsed on cover: File No. 23,445. U. S. Circuit Court Appeals, 3d Circuit. Term No. 870. Martha Young, administratrix of the estate of Peter B. Young, deceased, plaintiff in error, vs. Central Railroad Company of New Jersey. Filed December 5th, 1912. File No. 23,445.

11

Office Supreme Court, U. S.
FILED
NOV 25 1913
JAMES D. MAHER
CLERK

No. 389.

October Term, 1913

IN THE

Supreme Court of the United States.

MARTHA YOUNG, Administratrix of the Estate of PETER B. YOUNG, Deceased,
Plaintiff in Error and Plaintiff Below,

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendant in Error and Defendant Below.

Writ of Error to the United States Circuit Court of Appeals for the Third Circuit.

Motion and Petition to Advance.

ULYSSES S. KOONS,
VEDANTUS B. EDWARDS,
Attorneys for Plaintiff in Error.

International, 236 Chestnut St.

IN THE

Supreme Court of the United States.

October Term, 1913. No. 389.

MARTHA YOUNG, ADMINISTRATRIX OF THE ESTATE OF PETER B. YOUNG, DECEASED,
Plaintiff in Error and
Plaintiff Below,

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendant in Error and
Defendant Below.

WRIT OF ERROR TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

And now, to wit, this first day of December, 1913, comes Martha Young, as administratrix of the estate of Peter B. Young, deceased, by her attorneys, Ulysses S. Koons and Vedantus B. Edwards, and moves this court to advance for argument, to such early date as may be convenient to said court, the case of Martha Young, Administratrix, etc., vs. Central Railroad Company of New Jersey, in which the said

Martha Young, administratrix, is plaintiff in error, and the Central Railroad Company of New Jersey is defendant in error, and the said Martha Young, administratrix, herewith files her petition to this Honorable Court praying that argument on the aforesaid writ of error may be advanced.

ULYSSES S. KOONS,
VEDANTUS B. EDWARDS,
Attorneys for Plaintiff in Error.

I hereby accept service of the within motion and petition.

Attorney for Defendant.

Martha Young, Administratrix of the Estate of Peter B. Young, Deceased,
Plaintiff in Error and Plaintiff Below,
vs.
Central Railroad Company of New Jersey,
Defendant in Error and Defendant Below.

No. 389.
Oct. Term, 1913.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Martha Young, administratrix of the estate of Peter B. Young, deceased, respectfully shows:

1. That on or about September 6, 1911, your petitioner began a lawsuit against the Central Railroad Company of New Jersey under the Federal Employers' Liability Act of Congress of April 22, 1908, to recover the sum of fifty thousand dollars ($50,000) for the death of plaintiff's intestate, the negligence alleged, inter alia, being the carelessness of certain co-employees of intestate in failing to give notice of the presence of their road engine on a main track, on which intestate, an engineer, was approaching, in a heavy fog, with his freight train.

2. That at the trial of the said cause, February 21, 1912, it was shown that on October 9, 1909, plaintiff's intestate was engineer of one of defendant's trains, an extra, carrying freight, etc., from Mauch Chunk, Pennsylvania, to a point in the State of New Jersey, being engaged in interstate commerce; that at about 8 A. M., while passing through a yard of defendant company, at Siegfried's, Pennsylvania, on a main track, during a heavy fog, intestate's engine collided with a road engine that had run out on this main track without the crew of the road engine's giving any notice or warning whatever of its presence on said track, to intestate.

3. That a verdict was rendered for plaintiff for $5430.00.

4. That subsequently, viz.: February 27, 1912, defendant filed a motion and reasons for a new trial, and a motion for judgment non obstante veredicto, under the Act of April 22, 1905, of the State of Pennsylvania (P. L. 286).

5. That in refusing both of said motions the learned trial judge, in answering defendant's conten-

tions that under its rules the accident happened solely through the failure of intestate to run through the yard under control and that the crew of the road engine were not obliged to take any precautions as to intestate's freight extra, said:

> "We do not understand such to be the law. We understand the correct rule to be that laid down in Southern Railway Co. vs. Craig, 113 Fed. Rep. 76, as follows:
>
> " 'We find no error in the modifications made by the court in giving the instructions requested. After giving the first instruction requested, the court simply said, in substance, that it was the duty of the switching engine to exercise ordinary care in avoiding collisions with trains entering the yard. We cannot conceive of any circumstances under which the operators of a railroad train are relieved from the use of ordinary care to prevent collisions with other trains. This is a duty that devolves upon those running and operating trains at all times. What constitutes ordinary care depends upon the relationship of the parties and the circumstances under which they act, and what would be ordinary care or common prudence under certain conditions would not be under others. It would certainly be incumbent upon the operator of a switching engine moving in a railroad yard, where regular and extra trains are coming and going, to observe a greater degree of caution on a dark, foggy night, when sounds are less distinct, and signals more difficult to be seen, than on a clear night, when such conditions do not prevail; and we, therefore, think that the second instruction requested, as modified by the court to the jury, was also properly given.'
>
> "While it was certainly the duty of Young to run through the yard with his engine under control, looking out for yard engines and other extras, the crew of the yard engine was bound to exercise ordinary care to avoid collision with trains entering the yard and to take proper precautions

against collision with trains entering the yard, the character of these precautions to be determined by the circumstances of the day, the heavy fog and the difficulty in hearing and seeing signals."

5. That the learned Court of Appeals for the Third Circuit in violation of the Seventh Amendment to the Constitution of the United States re-examined the facts as found by the jury below and reversed the judgment of the court below and entered judgment for the defendant; contrary to the law as since enunciated by your Honorable Court in Slocum vs. Ins. Co., 228 U. S. Rep. 400 (1913).

6. That your petitioner is advised by counsel learned in the law, and therefore avers, that the learned Court of Appeals for the Third Circuit erred in re-examining facts found by a jury, in a manner violating the Seventh Amendment to the Constitution and in stating that the crew of the road engine were not obliged to take any precautions to prevent a collision with intestate's engine.

7. That your petitioner strongly feels that there must surely be some legal redress for her for the loss of her deceased husband under the circumstances as narrated above, where he was properly and fully discharging his duty and where his co-employees were guilty of such negligence as caused the accident.

8. That petitioner was made a widow by reason of this accident and was left entirely dependent upon her own efforts for her support; that she is going on forty-six years of age and is in anything but robust health, but has struggled as best she could to maintain herself since the death of her husband in October of 1909, and to carry on this litigation to secure what she believes to be her rights.

If, in the wisdom of this court, it is consistent with the other prior and probably more important business and not trespassing and engrossing too much upon the rights of other litigants, she prays this court to fix an early time for the argument and disposal of her writ of error, and as she is advised by her counsel that the hearing of her case would consume but a comparatively brief space of time, she suggests to the court, if necessary, that her case may be placed on the summary docket.

For all of which relief your petitioner respectfully prays.

MARTHA YOUNG,
Administratrix of the Estate of Peter B. Young, Deceased.

By her attorneys,
ULYSSES S. KOONS AND
VEDANTUS B. EDWARDS.

/2

SUPREME COURT, U. S.
FILED
JAN 2 1914
JAMES D. MAHER
CLERK

No. 389.

October Term, 1913.

IN THE

Supreme Court of the United States.

MARTHA YOUNG, Administratrix of the Estate of PETER B. YOUNG, Deceased,
Plaintiff in Error and Plaintiff Below,

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendant in Error and Defendant Below.

Writ of Error to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

ULYSSES S. KOONS,
VEDANTUS B. EDWARDS,
Attorneys for Plaintiff in Error.

International, 236 Chestnut St.

INDEX.

	Page
Names of the Parties	1
Nature of the Proceedings	1
Statement of the Case	2
Presenting succinctly the questions involved and the manner in which they were raised	4
Specification of Errors relied upon	5
Argument	5
1. *The Circuit Court of Appeals for the Third Circuit erred in holding that the crew of engine 514 were not obliged to give any warning to plaintiff's decedent of the presence of their engine on the track on which he was approaching with his freight train through a heavy fog*	6
2. *The said Court erred in holding that engine 514 was not subject to rules 99 and 99a of the defendant company*	17
3. *The said Court erred in holding that engine 514 was a "yard engine or other extra" within the meaning of said rule 107,*	21
4. *The said Court erred in holding that the death of plaintiff's decedent was due solely to his negligence in not observing rule 107*	26
5. *That plaintiff's decedent did not assume the negligence of the crew of 514 as a risk of his employment*	31
6. *That the said Circuit Court of Appeals for the Third Circuit erred in entering judgment n. o. v. in favor of the defendant company contrary to the provisions of the Seventh Amendment of the Constitution of the United States and in not sustaining the verdict for the plaintiff and judgment thereon in the District Court*	33

ALPHABETICAL LIST OF ALL CASES REFERRED TO, TOGETHER WITH REFERENCES TO PAGES WHERE CITED.

Page

Aerkfetz vs. Humphreys, 145 U. S. 418 (1892) 7-9

Anabele vs. New York Central & Hudson Ry., 122 N. Y. Supplement, 713 (1910) 29

Act of April 22, 1905, State of Penna. 34

Birmingham vs. Moseley, 164 Ala. 11 (1909) 30

Butts vs. Armor, 164 Pa. 73 (1894) 34

Chicago, R. I. & P. Ry. vs. Ship, 174 Fed. Rep. 353 (1909) 7-9

Cyc., Vol. 26, P. 1162 29

Dalmas vs. Kemble, 215 Pa. 410 (1906) 34

Devlin vs. Beacon Light Co., 198 Pa. 583 (1901) 35

Federal Employers' Liability Act of Congress of April 22, 1908 .. 1-31

Kreigh vs. Westinghouse, Church, Kerr & Co., 214 U. S. 249 (1909), 36

Lynch vs. R. R., 128 N. W. Rep. (Minn.) 457 (1910) 30

Little Rock & M. R. Co. vs. Barry, 84 Fed. Rep. 944 (1898) 7-8

North American Oil Co. vs. Forsyth, 48 Pa. 291 (1864) 34

Rosney vs. Railway Co., 135 Fed. Rep. 311 (1905) 7-8

Ry. Co. vs. Craig, 187 U. S. 641 (1902) 12

Sandidge vs. Ry. Co., 193 Fed. Rep. 867 (1912) 33

Slocum vs. Ins. Co., 228 U. S. 364 (1913) 33

Southern Ry. Co. vs. Craig, 113 Fed. Rep. 76 (1902) 11-12-13-14

Southern Ry. Co. vs. Smith, 205 Fed. Rep. 360 (1913) 9-14

Schirmer vs. Goss, 200 Fed. Rep. 396 (1912) 27

Willis vs. Telephone Co., 75 Atl. Rep. (N. H.) 877 (1910) 30

Wright vs. Yazoo & M. V. R. Co., 197 Fed. Rep. 94 (1912) 31

Wright vs. Chicago, &c., Co., 143 N. W. Rep. 220 (1913) 13

IN THE

Supreme Court of the United States.

October Term, 1913. No. 389.

MARTHA YOUNG, ADMINISTRATRIX OF THE ESTATE OF PETER B. YOUNG, DECEASED,
Plaintiff in Error and Plaintiff Below,

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Defendant in Error and Defendant Below.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

An action in trespass brought in the former District Court for the Eastern District of Pennsylvania under the Federal Employers' Liability Act of Congress of April 22, 1908, by the widow appointed administratrix on behalf of herself and two minor children, to recover damages for the alleged wrongful killing of her husband by reason of the negligence of the employing railroad company, its servants and employees.

STATEMENT OF THE CASE.

Plaintiff in error's decedent, Peter B. Young, engineer of freight train No. 184, of the defendant company, was bound eastward with a train partly of coal and partly of live-stock cars, from Haucks, Pennsylvania, to Jersey City, New Jersey, on the morning of October 9, 1909, when the fog was so thick and heavy while Young was passing through defendant's yard at Siegfried, Pennsylvania, it was not possible to see ahead more than three or four car lengths, that is from eighty to one hundred feet. As he entered the yard, he shut off steam and drifted along at the rate of eighteen to twenty miles an hour, the automatic block signal, No. 962, at the entrance to the yard, showing clear, which under defendant's rules indicated to him and his crew that their track, in front of them was unoccupied by any other engine or train. Shortly after Young's train passed this block signal a road engine of the defendant, No. 514, crossed over from the west-bound main track to Young's track, the east-bound main track, at a cross-over switch 3062 feet east of block signal No. 962, at the rate of about six to eight miles an hour, and without sending out any flagman or giving any signal or sign or warning of any kind whatever to Young's train of the presence of No. 514 on his track, neither crew having any information or notice of the movements of the other crew. While No. 514 was backing slowly eastward on Young's track for the purpose of running along said track for several miles, his engine appeared suddenly through the fog and almost instantly collided and locked with 514, a much smaller engine than Young's, both running eastward about 1985 feet, all of which time Young stood by his engine, until it was derailed and he was crushed underneath.

At the trial the defendant requested binding instructions on its behalf because of Rule 107 of its Book of Rules:

> "Yard limits will be indicated by yard limit boards. Within these limits yard engines may occupy main tracks protecting themselves against scheduled trains. Extra trains must run through yard under control, looking out for yard engines and other extras."

Plaintiff offered in evidence defendant's book of rules and also instructions given by an official of the defendant company delegated for the purpose of instructing its employees in their duties and contended that by reason of all the rules and instructions, and in view of all the facts and circumstances presented, the question of defendant's liability for the conduct of the crew operating engine 514 must be left to the jury.

On submission of the case to the jury, after a full and comprehensive charge by the learned trial judge, a verdict was rendered in plaintiff's favor for $5430, and subsequently defendant in error filed a motion for a new trial and also a motion for judgment for defendant n. o. v. on the whole record, both of which motions were refused by the court and subsequently defendant in error took his appeal to the Circuit Court of Appeals of the United States for the Third Circuit, which reversed the judgment of the court below and notwithstanding the verdict of the jury in favor of the plaintiff, entered judgment for the defendant upon the ground that the case was ruled entirely by Rule 107 and that the crew of engine 514 were not guilty of any negligence. Hence this appeal.

THE MAIN QUESTION INVOLVED IS: WHETHER UNDER ALL THE RULES OF THE DEFENDANT COMPANY, THE CREW OF 514, UNDER ALL THE FACTS AND CIRCUMSTANCES, WERE NOT GUILTY OF NEGLIGENCE IN FAILING TO GIVE DECEDENT WARNING OF THE PRESENCE OF 514 ON HIS TRACK, ON WHICH HIS TRAIN WAS APPROACHING, THROUGH A THICK, HEAVY FOG?

Subsidiary questions involved are:

1. *Whether or not engine* 514 *was subject to rules* 99 *and* 99*a of the defendant company?*

2. *Whether or not engine* 514 *was a "yard engine or other extra" within the meaning of rule* 107 *of the defendant company?*

3. *Whether or not under all the rules of the defendant company, in actual operation and effect at the time of the accident, plaintiff's decedent was guilty of any contributory negligence whatever?*

4. *Whether or not under the Federal Employers' Liability Act, plaintiff's decedent assumed the negligence of his fellow servants, viz., the crew of* 514, *as a risk of his employment?*

5. *Whether in view of the fact that the Circuit Court of Appeals of the United States for the Third Circuit entered judgment n. o. v. in favor of the defendant company, contrary to the provisions of the Seventh Amendment of the Constitution of the United States, the verdict for the plaintiff should not be reinstated and judgment thereon be entered in her favor?*

ASSIGNMENTS OF ERROR.

First.—The Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the District Court for the Eastern District of Pennsylvania.

Second.—The Circuit Court of Appeals for the Third Circuit erred in directing the said District Court to enter judgment in favor of the defendant.

Third.—The Circuit Court of Appeals for the Third Circuit erred in not affirming the judgment of the said District Court.

Fourth.—The Circuit Court of Appeals for the Third Circuit erred in re-examining the facts found by the jury in the said District Court and embodied in the judgment entered by that court, by a method otherwise than according to the rules of the common law, which said act of the Circuit Court of Appeals was in violation of the Seventh Amendment to the Constitution of the United States.

ARGUMENT.

In presenting her argument, plaintiff in error will take up in order and elaborate upon the following:

I. *The Circuit Court of Appeals for the Third Circuit erred in holding that the crew of engine* 514 *were not obliged to give any warning to plaintiff's decedent of the presence of their engine on the track on which he was approaching with his freight train through a heavy fog.*

II. *The said court erred in holding that engine* 514 *was not subject to Rules* 99 *and* 99a *of the defendant company.*

III. *The said court erred in holding that engine* 514 *was a "yard engine or other extra" within the meaning of said Rule* 107.

IV. *The said court erred in holding that the death of plaintiff's decedent was due solely to his negligence in not observing Rule* 107.

V. *That plaintiff's decedent did not assume the negligence of the crew of* 514 *as a risk of his employment.*

VI. *That the said Circuit Court of Appeals for the Third Circuit erred in entering judgment n. o. v. in favor of the defendant company contrary to the provisions of the Seventh Amendment of the Constitution of the United States, and in not sustaining the verdict for the plaintiff and judgment thereon in the District Court.*

FIRST:

THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED IN HOLDING THAT THE CREW OF ENGINE 514 WERE NOT OBLIGED TO GIVE ANY WARNING TO PLAINTIFF'S DECEDENT OF THE PRESENCE OF THEIR ENGINE ON THE TRACK ON WHICH HE WAS APPROACHING WITH HIS FREIGHT TRAIN THROUGH A HEAVY FOG.

It is respectfully submitted that the first question is the main one involved in this controversy and that if plaintiff-in-error's contention is sustained, the remaining questions require no further consideration; for at the trial the issue was brought down to the following allegation in plaintiff's amended statement of claim (See p. 10, Record):

> "That the crew or co-employees of said Peter B. Young, in the employ of said defendant company, were careless and negligent in that they

allowed the said engine that collided with the said engine of Peter B. Young to be on his track without giving proper notice and warning to said Peter B. Young or any other member of his crew operating his said engine."

Defendant's testimony does not deny what plaintiff's witnesses clearly testified to, viz.: That road engine 514 came out in this heavy fog on the east-bound main track without giving any warning of any kind whatever to the on-coming freight train, which, according to the semaphores, had a clear track before it and was entitled to go on.

On the contrary, defendant's sole reply to the foregoing is that the crew of road engine 514, under Rule 107 of the defendant company, were not obliged to give any warning whatever of their movements on the east-bound main track, even though a heavy fog was prevailing at the time.

Rule 107 provides as follows:

"Yard limits will be indicated by yard limit boards. Within these limits, yard engines may occupy main tracks, protecting themselves against scheduled trains. Extra trains must run through yard under control looking out for yard engines and other extras."

In support of this contention, defendant relied on the following cases: *Little Rock & M. R. Co. vs. Barry*, 84 Fed. Rep. 944 (1898); *Rosney vs. Railway Co.*, 135 Fed. Rep. 311 (1905); and *Chicago, R. I. & P. Ry. vs. Ship*, 174 Fed. Rep. 353 (1909), and *Aerkfetz vs. Humphries*, 145 U. S. 418 (1892).

As it is upon the authority of these cases that the Circuit Court of Appeals entered judgment for the defendant (250, etc., Record) and found as follows (257, Record):

"In the view here taken, of the intent and meaning of Rule 107, as sanctioned by the prac-

> tice of well conducted railroads, we are prepared to say that no negligence had been shown on the part of the crew of yard engine 514, in not protecting itself against the oncoming freight train 184, by flag, torpedo, or other warning. It was within the intent and reason of the rule that the plaintiff's decedent should not expect such a warning in his passage through the yard limits. As no negligence on the part of the crew of yard engine 514, with reference to the accident, was shown by the evidence, no question in that regard should have been submitted to the jury."

let us consider what these cases actually ruled. And first, it is important to note that they all were decided prior to the passage of the Federal Employers' Liability Act, and were, of course, subject to the prevailing common law rules of negligence:

Little Rock & M. R. Co. vs. Barry, supra: This was a rear end collision caused by failure of the crew of the first train to protect rear of their train as required by the rules of the railroad company. Verdict for plaintiff was reversed, *but a new trial ordered by the Circuit Court of Appeals* which based its reversal on the ground that the accident occurred solely by reason of the negligence of the crew of the first train and that their negligence was one of the risks assumed by plaintiff.

In short, the case turned upon the law as it then existed, viz: that the master was not liable for the negligence of a fellow-servant.

So too, *Rosney vs. Erie Railway Company, supra,* a head-on collision between two engines, one of which had no headlight. Although it was argued that the yard rules were insufficient, the Circuit Court of Appeals in affirming the court below in its judgment against the plaintiff, held, that as the crews of the colliding trains were fellow servants, there could be no recovery.

And in *Chicago, R. I. & P. Ry. vs. Ship, supra,* an engine of an extra freight train running through one of the yards of railroad company *saw,* 200 or 250 feet ahead of him, a dark streak, but supposing it was merely the shadow of one of a string of cars on the adjoining track, proceeded without abating his speed until he was within sixty feet when he saw that the supposed shadow was really a car on his track. Collision followed.

In that case there was no evidence of any bewildering fog. On the contrary the engineer saw the object on the track, *had notice of it,* which is precisely what plaintiff's decedent in this case did not have. The court held, moreover:

> "The facts stated clearly show that Ship violated both of the foregoing rules made for his benefit, and, therefore, was guilty of negligence *which directly contributed to his injuries.* The non-observance of these rules was negligence as a matter of law."

But under the Federal Employers' Liability Act, the question of contributory negligence must be left to the jury, which was precisely what the learned trial judge did in this case, for the court told the jury (230, Record) that if the accident occurred solely through the negligence of plaintiff's decedent there could be no recovery, which surely is as far as the court could go under the Act. Further, the court explained fully to the jury the matter of diminution of damages, proportionate to the decedent's contributory negligence, if any there was.

As to *Aerkfetz vs. Humphries, supra,* the distinction between that case and this will appear from *Southern Ry. Co. vs. Smith,* 205 Fed. Rep. 360, May 6, 1913 (see infra, p. 14).

The foregoing cases, which are fully set forth in the opinion of the Circuit Court, Judge Gray, are also

relied upon as authority for the following statement of law (252, Record):

> "The skilled experienced railroad operators who seem to have developed these rules, are undoubtedly more competent than jurors or judges to select and prepare rules conducive to the safe, economical and prosperous operation of railroads."

Nevertheless, with all deference for the opinion of the court below, we again assert that we do not deny that the foregoing citation is a correct statement of the law. But our position is, briefly, this:

(*a*) We deny that this case is to be decided wholly by reference merely to *one* of the defendant company's rules, viz: Rule 107, supra.

(*b*) We do not believe that any body of experienced railroad operators no matter how skilled or expert, can formulate rules so comprehensive and explicit that *under all circumstances,* employees are absolved from taking any precautions whatever other than those specifically and in detail set forth in the Book of Rules.

It hardly seems credible that any railroad company, having a due regard for the welfare of its employees, and its property and the property of its patrons would seriously contend, as in this case, that Rule 107 was sufficient *under all circumstances.*

Fortunately for the railroad companies, but unfortunately for defendant's contention here, its own Book of Rules realizes that Rule 107 is not applicable to all cases, but is a mere general statement as to the relative duties of the crews of extra freight trains and of yard engines.

This is evident from the following rules of the defendant company which were also in evidence (81, Record):

Page 23 of Book of Rules:

"105. *Both conductors and engine men are responsible for the safety of their trains, and, under conditions not provided for by the rules, must take every precaution for their protection.*"
And especially:
"106. *In all cases of doubt or uncertainty the safe course must be taken and no risks run.*"

Surely these rules were as obligatory on the crew of 514 as any other rule set forth in the Book of Rules; for the defendant's own testimony shows that the crew of 514 were instructed on the *whole* Book of Rules (see testimony, Edward L. Graver, conductor engine 514, p. 89, Record).

Precisely the same contention that defendant in error is making here was made in *Southern Railway Co. vs. Craig*, 113 Fed. Rep. 76 (1902), and was flatly repudiated.

That case was an action to recover damages for the death of Craig, a conductor in charge of a ballast, or gravel train, on defendant's railroad. Craig, as conductor of his train, an extra, had orders to precede a delayed (ten hours) regular train into the defendant's yard. No instructions were given to look out for any other train on entering the yards. Craig was killed in a collision with a switching engine in the yards. No notice of the approach of the extra train had been given to those on the switching engine (which was precisely the fact in the present case, as admitted by defendant's witnesses, namely, that neither the switch engine nor Young's engine had any information whatsoever as to the movements of the other). *The company's rules, known to Craig, gave the right of way to switch engines in the yards, and required that extra trains must approach and run through yard limits under full control.* The evidence as to whether decedent's train was under full control was conflict-

ing. The night of the accident was shown to be dark and foggy. Held, that, *notwithstanding the rules of the company,* it was the duty of the crew of the switching engine to exercise ordinary care in avoiding collision with oncoming trains:

> "We find no error in the modification made by the court in giving the instructions requested. After giving the first instructions requested, the court simply said, in substance, that it was the duty of the switching engine to exercise ordinary care in avoiding collisions with trains entering the yard. *We cannot conceive of any circumstances under which the operators of a railroad train are relieved from the use of ordinary care to prevent collisions with other trains. This is a duty that devolves upon those running and operating trains at all times.* What constitutes ordinary care depends upon the relationship of the parties and the circumstances under which they act, and what would be ordinary care or common prudence under certain conditions would not be under others. *It would certainly be incumbent upon the operator of a switching engine moving in a railroad yard, where regular and extra trains are coming and going, to observe a greater degree of caution in a dark, foggy night, when sounds are less distinct, and signals more difficult to be seen, than on a clear night, when such conditions do not prevail;* and we, therefore, think that the second instruction requested, as modified by the court to the jury, was also properly given."

(Verdict and judgment for plaintiff affirmed and petition for certiorari to U. S. Supreme Court denied in the above case: *Ry. Co. vs. Craig,* 187 U. S. 641 [1902].)

In his opinion discharging the motions for judgment n. o. v. in favor of the defendant and for a new trial, the learned trial judge held, after citing the Craig case, supra, as follows (Record, 242):

"While it was certainly the duty of Young to run through the yard with his engine under control, looking out for yard engines and other extras, the crew of the yard engine was bound to exercise ordinary care to avoid collision with trains entering the yard and to take proper precautions against collision with trains entering the yard, the character of these precautions to be determined by the circumstances of the day, the heavy fog and the difficulty in hearing and seeing signals."

The record in this case was before the Circuit Court and contained the opinion of the court below, citing and relying on *Southern Ry. Co. vs. Craig,* supra, which was also set forth fully in our brief and argued orally, and yet the opinion of the Circuit Court, Gray, J., ignores the Craig case completely, although we respectfully submit, it is decisive of the case at bar and we state this the more confidently by reason of the fact that within the last year and since the opinion of the Circuit Court of Appeals was rendered the Craig case has been followed in:

Wright vs. Chicago &c. Co., 143 N. W. Rep. 220 Adv. Notes, Oct. 24, 1913, p. 220 (Supreme Court Nebraska, Sept. 26, 1913), Faucett, J.

Engineer killed while running engine as extra through yard by collision with switch engine. Under rules of company switch engine in Lincoln yards, where accident occurred, had right to occupy main track.

Extra, run by decedent, was required to proceed through the yard *under full control,* and protect itself within yard limits, *switch engine having right of way over extra.* It was duty of decedent to be on lookout for switch engine, and to take such precautions as situation demanded to prevent a collision.

Held: That this did not relieve crew of switching

engine from exercise of ordinary care in avoiding a collision with an extra.

And the court cites Southern R. Co. vs. Craig, 113 Fed. Rep. 76 (supra), and quotes language we rely on (supra, p. 12) and says:

> "We think this reasoning is eminently sound, and its application to the switching crew in charge of 1220 is apparent. They knew the extra was in the yard. They had been expressly notified of the fact. They knew that when the extra moved further through the yards it would be running on the main track and for them to run their engine upon the main track around the curve and through the cut at the rate of speed at which they were unquestionably running was a disregard of the lives of those upon the engine of the extra. . . .
>
> "A rule that a switch engine may run through the yards on the main line not under control but at a high rate of speed, when its crew all know that there is an 'extra' on the main line passing through the yards, would be a barbarous rule."

Hamer, J., dissented on the ground that the jury were not properly instructed. But said:

> *"I apprehend that the railway company may make no rule which would relieve the crew of the switching engine from exercising ordinary care and common prudence to avoid a collision."*

There, it is true, the switch engine knew a train was approaching on their track and bound to run under control and look out for the switch engine. Here, there is no evidence that the crew of 514 actually knew of Young's train; but 514 did know that there was a heavy, almost impenetrable fog, and that their engine was on a main track on which a train was likely to come any moment.

So also the case of *Southern Ry. Co. vs. Smith*

(Cir. Ct. of Appeals, Sixth Circuit), 205 Fed. Rep. 360 (May 6, 1913):

> "This was an action for damages brought under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65, U. S. Comp. St. Supp. 1911, p. 1322), on account of the killing of a switch tender, J. P. Smith, by a switch engine in the railway yards. It presents as controlling the question whether there was any evidence fairly tending to show a lack of due care on the part of the engineer in not observing Smith upon the track in time to avoid the accident; or whether, on the other hand, the evidence permits only the conclusion that Smith stepped upon the track so closely in front of the coming engine that absence of due care by the engineer may not be inferred. . . . There was legal support for the theory that Smith stepped upon the track eighty or one hundred feet ahead of the engine, and walked along the track with his back to the engine while it was covering one hundred and fifty feet at a very slow speed. *Accepting the engineer's testimony that he did not see Smith or know of the injury till later, it would follow that the engineer was not looking; and, as he could have stopped his engine in ten feet or given a probably effective warning, the failure to took would bear causal relation to the injury.* Clearly, this situation would tend to show negligence, unless the Railway Company is right in its contention, founded on Aerkfetz vs. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, that defendant owed to a switch tender, walking on the track, no duty to take any care to avoid running him down.
>
> "(1) We cannot say that there was no duty whatever to keep a lookout for Smith. Doubtless, it was primarily Smith's duty to keep out of the way, *but this did not absolve the engine crew from all obligation.* The care required and the duty imposed with reference to the yard employes seen upon the tracks are much less in degree than with reference to strangers; *but defendant's theory of*

no duty would extend to a case where an employe was obviously helpless on the track and might have been seen for some time from the coming engine. It would permit the engine crew to run through the yard with their eyes shut, and it is too broad. Under such facts as here exist, there must be a concurrent or secondary duty, independent of statute or rule, to keep such lookout as is reasonably necessary to avoid injury to the employe who may neglect his primary duty to protect himself. McMarshall vs. Railway, 80 Iowa, 757, 761, 45 N. W. 1065, 20 Am. St. Rep. 445; Schlereth vs. Railway, 115 Mo. 87, 21 S. W. 1110; Railroad vs. Craft (C. C. A. 9), 69 Fed. 124, 128, 16 C. C. A. 175.

"(2) Such concurrent duty is, in the present case, emphasized by the surrounding conditions. The engine was 'drifting,' and so was coming in comparative silence; it had an oil headlight, dimmed by surrounding electric yard lights; a freight train was passing on the adjacent track covering up whatever noise the switch engine did make; and, as there was a row of electric lights along the track on which the engine was coming, one or more of them, with such blinding or confusing effect as it might have, would be between the engine and any one upon the track a little distance ahead. *These unusual conditions tended to increase or make active this duty which we have called secondary, and which, under other conditions, might remain wholly latent.*

"There remains only the question whether the engineer, if he had seen Smith walking along the track, would have been justified in supposing, until too late to avoid the injury, that Smith would step one side out of danger; and this brings us directly to the Aerkfetz case. That decision should be distinguished from the present case, for at least three reasons: (1) *It did not involve the negligence of the train crew as fellow servants of Aerkfetz,* but the nondelegable duty of the master to provide a safe place to work, and it must be read with due regard to the point involved; (2) it did

not deny the ordinary duty to look out ahead by the engineer, but the extraordinary duty to send an extra man ahead of the moving cars which the engine pushed; (3) Aerkfetz was working on the track. His duty required him to remain there as long as consistent with safety, and so the fact that he continued to work would not be at all significant of lack of knowledge by him that the cars were approaching."

(Judgment for plaintiff affirmed.)

Wherefore, it is respectfully submitted that the case at bar was properly submitted to the jury and the verdict for the plaintiff should be reinstated and judgment entered thereon.

While a consideration of the remaining points is not necessary to sustain a reversal of the judgment of the Circuit Court of Appeals, the facts and the law pertaining to each of these points will, at least, emphasize the fact that the case was properly submitted to the jury and that the verdict for the plaintiff for $5430 was fully justified:

SECOND POINT:

"THE CIRCUIT COURT ERRED IN HOLDING THAT ENGINE 514 WAS NOT SUBJECT TO RULES 99 AND 99a OF THE DEFENDANT COMPANY."

With respect to this point, the opinion of the Circuit Court of Appeals is not quite accurate; for the court held (257, Record):

"It remains only to consider the contention of plaintiff's counsel, that whatever view might be taken of the sufficiency and reasonableness of this rule, there was evidence to show that it was not adhered to in practice."

(The court here refers to rule 107.)

In other words, the Circuit Court failed to note that the testimony went further than to show that

Rule 107 was not adhered to in practice; for the testimony showed that under the *instructions* from Mr. Brobst, an officer of the defendant delegated to instruct its employees in its rules, the *instructions* were that as to engines like 514, Rule 107 did not apply, but that the crew must control its operations under Rules 99 and 99a of the defendant's Book of Rules, which are as follows:

Rule 99a (Record, 82):

> "On double track when a train crosses over to, or obstructs the other track unless otherwise provided, it must be protected as described by Rule 99, in both directions on that track."

Rule 99 (Record, 81):

> "When a train stops or is delayed under circumstances in which it may be overtaken by another train, the flagman must go back immediately with stop signals a sufficient distance to insure full protection. When recalled, he may return to his train, first placing two (2) torpedoes on the rail when the conditions require it. The front of a train must be protected in the same way, when necessary by the front brakeman, or in his absence by the flagman."

Following was the testimony of Mr. Bartlett, decedent's fireman (p. 217, Record):

"By Mr. Koons:

Q. How long have you been in the employ of the Central Company altogether in different capacities, prior to the accident?

A. *About fifteen months.*

Q. *How long were you a brakeman?*

A. *Brakeman and flagman is the same, pretty near the same capacity.*

Q. *On what kind of trains?*

A. *All kinds.*

Q. *All kinds of trains?*

A. *Yes, sir.*

Q. Tell me what some of those trains were.

A. *I have been on yard engines; I have been on coal trains; I have been on local freights.*"

And page 218, Record:

"Q. *What instructions, if any, were you given with reference to the movement of yard engines on the main tracks and cross-overs?*

MR. DICKSON: By whom?

By MR. KOONS:

Q. *By whom were you given instructions?*

A. *By Brobst.*

Q. *What instructions were given with reference to the movement of trains such as this yard engine in this particular case?*

A. *To prepare myself with Rule 99a.*

Q. *In connection with those instructions what was done when you came out in the yard with yard engines on the main tracks?*

A. *Always protected myself with a red flag or red lighted light.*"

And page 219, Record:

"Q. *In day time where did you put these red flags when you came out?*

A. *Generally used to have them in our hands, or in the back of the engine some place.*

Q. *You carried them for that purpose?*

A. *Yes, sir.*

Q. *Upon what trains did you use them?*

A. All kinds.

Q. All trains?

A. Yes, sir.

Q. For what purpose?

A. To avoid accidents with oncoming trains.

Q. Did that apply to a case like this, where a yard engine came out on the main track and got ready to go away?

A. Yes, sir; you were supposed to protect yourself.

Q. Go up the track with the flag?

A. Yes, sir.

Q. *Those were your instructions?*

A. *Yes, sir.*

Q. And that was the practice there?

A. Yes, sir."

Can the testimony of such a witness (even though he was discharged because he refused after being on duty for fourteen hours, and after he saw his engineer killed, to take charge of another train), who speaks from actual knowledge and not from theory, be absolutely disregarded, especially when it was evident from the testimony of Mr. Brobst, in sur-rebuttal, cross-examination (Record, 224), that he really did not know from his own knowledge what the practice was at Siegfried's yard? But if Bartlett's testimony was incorrect or untrue that the *instructions, practice and custom in this yard followed Rule* 99*a* instead of 107, defendant had ample opportunity to offer evidence in sur-rebuttal; for there were present in the court room at the trial, the following witnesses:

Edward Decker, Young's fireman, and still in the employ of defendant, who was called in sur-rebuttal by defendant (Record, 224), but who, strangely enough, was not asked to deny or contradict Bartlett's testimony, and still more significant is the fact that two of the defendant's witnesses, also still in its employ, Edward L. Graver, conductor of engine 514, and Albert Ryner, brakeman of 514, were not called in sur-rebuttal to deny Bartlett's testimony, as aforesaid, and it is exceedingly important to note that when Ryner was called in chief by defendant he was not asked anything whatever about the rules or the practice or custom (Record, 102 to 107), nor did defendant produce at any time or explain the absence of Brakeman Decker (not Young's fireman, of same name) of the crew of 514.

Wherefore, we have the clear, unequivocal testimony that the crew of 514 disobeyed the defendant's *direct instructions* to follow Rules 99 and 99a, and were guilty of negligence; and on this point alone, if there were no others, the case was for the jury; for

what the Circuit Court opinion says as to violation of printed rules, *by practice and custom*, has no application in view of the foregoing testimony *as to instructions.*

THE THIRD POINT:

THE CIRCUIT COURT ERRED IN HOLDING THAT "ENGINE 514 WAS A 'YARD ENGINE OR OTHER EXTRA' WITHIN THE MEANING OF RULE 107, OF THE DEFENDANT COMPANY."

Defendant's contention is that Rule 107 speaks for itself; that it governs under all circumstances; that we must not read anything into it or out of it; but that we must take it to mean just what it says, in express terms.

Let us apply, then, defendant's method to Rule 107: It says "*yard engines* may occupy main tracks," etc., and that extras on the main tracks must be "Looking out for *yard* engines and other extras."

That is, decedent's train in running through the various yards of the defendant was obliged to run under control looking out for "yard engines" and "other extras," if defendant's contention is correct.

On page 9 of the defendant's Book of Rules under the heading "Definitions," we have the following:

> "YARD ENGINE.—An engine assigned to yard service and working within yard limits."

This is the defendant's own definition and we see that a yard engine must have two characteristics. It must not merely be an engine working within yard limits, as defendant would have us believe, but it must in addition to that "be an engine assigned to yard service."

As to the meaning of "extras" under Rule 107, we find in defendant's Book of Rules, page 7, under the heading "definitions" the following:

"EXTRA TRAIN.—A train not represented on the Time-Table. It may be designated as

Extra—for any extra train, except work extra;

Work extra—for Work train extra."

It is respectfully submitted that engine 514 did not come within either the definition of a yard engine or of an "extra." This is best shown by what the witnesses say of No. 514.

John Corrigan (Record, 75 and 76), conductor of 184, decedent's train:

"Q. Do you know what the usual duties of the train were, where it came from and what it did?

A. *Started from Bethlehem Junction.*

Q. *With what?*

A. *As a passenger train.*

Q. Then what did it do?

A. Worked as a shifting engine until evening then.

Q. So it had varied duties to perform?

A. Yes, sir.

Q. Carrying workmen?

A. Yes, sir.

Q. Then it would do shifting work in and about the yard?

A. Yes, sir.

Q. Just what work it was doing at this time you do not know?

A. No, I do not."

And Mr. Graver, conductor of 514, defendant's witness (Record, 94):

"Q. This was not a yard engine, strictly speaking, was it?

A. It was an extra doing a yard engine's work.

Q. Sometimes did yard engine work, but a sort of an extra train?

A. *Extra engine.*

Q. *Practically the same class of train as Mr. Young's?*

A. No.

Q. Wasn't his an extra?

A. *Yes.*

Q. Yours was not a regular scheduled train, was it?

A. Ours *was an extra yard engine.*"

And Mr. Bartlett (Record, p. 84):

"Q. What did it do? What was the first that it did, if you know?

A. *Run as a first class train as far as Siegfried.*

Q. And after that?

A. After that pushed coaches away and do railway drill.

Q. What was that?

A. Drill—place cars in the cement work from Siegfried, run as far as West Allentown."

Edward E. Corwin, Division Superintendent of Central Railroad Company of New Jersey, defendant's witness (Record, 180):

"Re-cross-examined by Mr. Koons:

Q. You said, I believe, that a yard engine was an engine that did day's work around the yard, through the day?"

And (Record, 181):

"A. Yes.

Q. And engines that do that kind of work, the men are paid yard wages?

A. *If their entire work is in the yard, they get yard wages.*

. . . . . .

Q. *The fact does remain that this engine also did road work?*

A. *Yes.*

Q. *Then sometimes it occasionally dropped in here and did yard work?*

A. *Yes.*"

And (Record, 173):

"Q. *Do you know whether these men were paid yard wages or road wages?*
A. *They were paid road wages.*
Q. *They were paid road wages?*
A. *Yes.*
Q. *They were not paid yard wages, were they?*
A. *They were not paid yard wages.*"

And on re-direct examination by Mr. Dickson, Mr. Corwin said (Record, 179):

"Q. You were asked the question as to the wages that were paid to the crew of engine 514. What does that have to do with the question 514 was at the time a yard engine?
A. It has nothing to do with it.
Q. Why not?
A. Because they were paid the high rate—that is, the road rate *for the reason that most of their work, the large part of their work was on the road.*
Q. Whether or not the engine is treated as a road engine or as a yard engine depends upon what?
A. *Depends on whether they are confined entirely to yard limits, for the day's work.*"

As 514 was admittedly not confined to Siegfried Yard we have the company's own definition that 514 was not a yard engine, but a road engine.

And Graver, Conductor of 514 (Record, p. 86):

"Q. What had you been doing on the west bound track before you crossed over to the east bound track?
A. Had been placing a car of brick on the station siding at Siegfried Station.
Q. And then what did you do?
A. *Then we went up the westward track to crossover on the way to Catasauqua.*"

And (Record, p. 91):

"Q. Then you started to go down the east bound track, you started very slowly at first, did you not?

A. Yes, sir.

Q. How soon after that was it that you started to go seven or eight miles an hour?

A. Shortly after we closed the westbound track switch.

Q. Five minutes?

A. Oh, no.

Q. About?

A. About two minutes, maybe, something like that, as near as I can get at it."

Wherefore we have Mr. Corrigan, who is still in the employ of the defendant, stating that No. 514 started from Bethlehem Junction *as a passenger train.* That it carried workmen and that it did *some work* as a shifting engine in the yards.

Mr. Graver, conductor of 514, still in the defendant's employ, would not say that it was a yard engine strictly speaking, but said it was an extra doing a yard engine's work and while he admitted that 184 was an extra he would not say that 514 was an extra. His idea was that 514 was "*an extra yard engine*" for which we fail to find any provision either in the definitions or under Rule 107.

Mr. Bartlett says that 514 ran as a *first class train* as far as Siegfried and after that did what he called *roadway drill* work.

Mr. Corwin, also defendant's employee and witness on behalf of defendant, says that the crews of yard engines received yard engine wages, but that the crew of 514 received road engine wages, which were higher than yard engine wages and under examination by counsel for defendant said that the reason they received road engine wages was because *most of their work was on the road* and further states that whether or not 514 was to be treated as a road engine or yard

engine depended on whether they were confined *entirely* to yard limits for the day's work.

Wherefore we surely are justified in claiming that this was not a yard engine and there is not one word in Rule 107 that a road engine like 514 may come out on the main lines, protecting itself only against scheduled trains, the necessary implication being that such engines must protect themselves under Rule 99a; and again we have the best corroboration of what Bartlett has stated, *that such were the instructions and the practice and custom at this place.* If it was a yard engine, why was it paid road engine wages? This is the defendant's own testimony; that it was a road engine and that it was paid road engine wages and not yard engine wages. How could the court state as a matter of law that this engine came within Rule 107?

On this point also the case was for the jury and while it is true that the learned trial judge in his charge to the jury, was silent on this point, surely defendant has no reason to complain.

FOURTH POINT:

THE SAID COURT ERRED IN HOLDING THAT THE DEATH OF PLAINTIFF'S DECEDENT WAS DUE SOLELY TO HIS NEGLIGENCE IN NOT OBSERVING RULE 107.

As to this the opinion of the Circuit Court of Appeals after holding that the accident occurred solely through Young's failure to obey Rule 107, states (257, Record):

> "Mere disobedience, at times, of such a rule, by those whom it is intended to govern, without knowledge or acquiescence of superior officers, is not sufficient to take this case to the jury."

But here again the court below failed to note accurately what Mr. Bartlett testified to (Record, pp. 217, 219, 220), viz.: that during the fifteen months of his

employment he had gone through this yard in extra trains as often as two or three times a week and that always *and not only "at times"* for trains like decedent's, the rate of speed, when they had "clear boards," as in this case, was from "fifteen to eighteen or twenty miles an hour."

Can it be seriously contended that anything so open and easily seen as an extra freight train proceeding through a yard at the rate of fiften to twenty miles an hour, two or three times a week, for a period of fifteen months was not known by the officials of the defendant, or not acquiesced in by them. Not to know, under these facts, was of itself negligence. Wherefore, it is difficult to see that decedent was guilty of any contributory negligence whatever.

This is clear from the cases: *Schirmer vs. Goss*, 200 Fed. Rep. 396 (1912):

> "There had been a rule adopted, and there was testimony showing that it was repeatedly disobeyed. We fully discussed the questions of rules, of their enforcement, and of the effect of *repeated violations* of them in Canadian Pacific Railway vs. Elliot, 137 Fed. 904, 70 C. C. A. 242. It is unnecessary to repeat anything there said. The court in the case at bar charged the jury that 'If there had been such a *continual* infraction as to indicate non-enforcement, *so that a man who was about his business reasonably would have ascertained it, a mere promulgation* of the rule would not have protected him.'
>
> "This was excepted to, but under the authority above cited it was a proper charge."

Of course, for infrequent infractions, or such as are not open and notorious, the master is not liable. This is all that the cases referred to in the opinion of the Circuit Court of Appeals of the Third Circuit decide.

Further there is every reason to believe that the crew of Young's train were doing precisely what was expected of them under all the rules of the defendant and that it was not contrary to defendant's rules and instructions and practice for decedent to proceed, i. e., "drift" through Siegfried's yard at a rate of from fifteen to twenty miles an hour, with *a live-stock* freight train; even in this fog, for first, he had "clear" boards; secondly, as Bartlett testified, *all* engines moving out on main tracks had to give warning of their presence there.

Moreover, John Corrigan, conductor of the freight train, did not testify anywhere that Young was exceeding the proper rate of speed. What Mr. Corrigan did say was that Young had to proceed through the yard "under control"; that is under Rule 107. But Corrigan was on the freight train, was its conductor, knew when his train entered the yard, and saw the density of the fog and yet he does not give the slightest indication to his engineer that he is running too rapidly. This is exceedingly significant especially when we consider how completely freight train conductors have the control and supervision of their trains.

See defendant's Book of Rules:

> Rule 1047: "They must use every means consistent with the business and rules of the road to avoid delay and to run trains with regularity, but, even if late, will take all loaded cars when they can be hauled, *giving preference to live stock and perishable freight.*"
>
> And Rule 1049: "When a train is in motion they will take a position that will give a full view of the train and see that the brakemen properly perform their duties and the flagman goes back promptly when the rules or safety so require; also keep a sharp lookout especially when rounding curves."

And the rules as to enginemen require, No. 956, that they must obey the orders of station agents, etc., and *"those of the conductor as to starting, stopping and the general management of trains."* It is only when enginemen are in charge of engines to which no conductors are assigned that the engineman is permitted under Rule 963 to perform the duties of and relating to conductors and (Record, p. 64) when asked whether or not as conductor he had charge and management of the train and what his duties were with reference to this train he answered "To look after the running of the train," and when Mr. Dickson for the defendant desired to know if witness was being asked his duties under the rules, and assured that such was the case, he was again asked the question and he answered: *"To look after the welfare of the train, to get it over the road."* And when he was asked how fast they were going he answered he judged about eighteen to twenty miles an hour, but neither in his examination in chief nor on cross-examination, did he at any time state that the train was going too fast or if so that he warned his engineer to slow up through this yard. On the contrary *his conduct* as testified to by himself shows that Young ran this live-stock train at the proper rate of speed in accordance with the custom and practice of the defendant under its own rules and Corrigan depended on 514 to keep clear of the east-bound main track, or to give proper warning of its presence there.

"But the mere adoption of rules and regulations will not exempt a Master from liability for negligence." (See Cyc, Volume 26, p. 1162, and the numerous cases cited in footnotes.)

Anabele vs. New York Central & Hudson Ry., 122 N. Y. Supplement (1910), page 713:

> "It may well be that rule 26 was originally intended to apply to work of this character, but a

> rule unenforced and unobserved will do no good. If such rule was necessary, *the duty of enforcing as well as making it was upon the defendant.*"

In *Willis vs. Tel. Co.*, 75 Atl. Rep. (N. H.) 877 (1910), it was held that whether instructions given by the master to a servant with regard to the method of straightening telegraph poles were properly interpreted was a question for the jury, the court saying:

> "From this it might be found that there was no intention on the part of the master that the instructions should be followed."

See also:

> *Lynch vs. R. R.*, 128 N. W. Rep. (Minn.) 457 (1910);
> *Birmingham vs. Mosely*, 164 Ala. 10 (1909).

But the Circuit Court of Appeals also held (Record, 251):

> "When the crew of yard engine No. 514 set the switches for the cross-over movement, they saw and heard nothing of the approach of Young's train, which had not whistled at the whistling post seven hundred and forty-five feet west of the cross-over."

But here, too, the court below had overlooked plaintiff's testimony, for Mr. Hammond (214, et seq., Record) and Mr. Bartlett (216, 217, Record) both testified that there was no whistle post west of the cross-over at which 514 moved out on the eastbound main track, but that there was a whistle post some distance east (or south) of the cross-over, *below* where the collision occurred. As Mr. Hammond had examined the place the day following the accident and Mr. Bartlett, as we have already seen, had passed through this yard two or three times a week for fifteen months,

the court was in error in stating as an uncontradicted fact that there was a whistle post seven hundred and forty-five feet west of this cross-over. Therefore the learned trial judge was clearly in the right in submitting the question of decedent's contributary negligence to the jury.

AS TO THE FIFTH POINT:

THAT PLAINTIFF'S DECEDENT DID NOT ASSUME THE NEGLIGENCE OF THE CREW OF 514 AS A RISK OF HIS EMPLOYMENT.

Prior to the passage of the Federal Employers' Liability Act the difference between contributory negligence and assumption of risk were frequently not clearly maintained, but since assumption of risk is still a complete defense under the act, it has become imperative to distinguish clearly between them. And in this connection the later authorities hold that the negligence of fellow servants cannot be called an assumed risk.

See opinion Circuit Court of Appeals below (257, Record):

> "If, however, its presence there, without warning, was negligence on the part of the defendant, there could be no such assumption of risk, *as a servant never assumes the risk of his master's negligence.*"

And this is clealy pointed out in the recent case of *Wright vs. Yazoo & M. V. R. Co.,* 197 Fed. Rep. 94 (1912).

Action under Federal Employers' Liability Act to recover damages for the death of husband, injured in collision between the engine and a cut of cars left standing on a side track of the defendant but not clear of intestate's track. Verdict for plaintiff. Defendant moved for a new trial:

"The specific question raised by the assignment is whether or not the deceased engineer, while running his engine into the yard of the defendants at Gwynn, Miss., assumed, by his contract of employment, the risk and danger incident to the negligent leaving by the defendant of a cut of cars not 'in the clear' of the track on which the deceased's engine was moving."

The opinion states that the rules of the defendant company required of its servants that they should place cars on the sidings in the clear; and

"Secondly, in the absence of such rule it would be negligence in the company to place and leave a cut of cars so that it would be in striking distance of an engine moving over and adjacent to the track in the manner the evidence shows was done in this case."

And:

"It is conceded that the common-law rule that contributory negligence barred the right of recovery has been abolished by the act. *Shall the courts destroy the effect of the act in this particular by holding that common carriers are not liable to their servants for injury or death inflicted as a result of the negligence of their officers, agents, or employees, upon the ground that the servant assumes the risk incident to the negligence of the officers, agents, or employees of the carrier?* In view of the first section of the act, which provides that such common carrier shall be liable in damages to its employee, resulting in whole or in part from the negligence of any of its officers, agents, or employees, it is not permissible, in my judgment, to hold that the employee assumes the risk of his employment which arises from the negligence of the officers, agents, or employees of the carriers." . . . "*As I construe the act, the risk that the employee now assumes is the ordinary dangers incident to his employment, which does not include, since the passage of this act, the*

assumption of the risk incident to the negligence of the carrier's officers, agents, or employees."

And in *Sandidge vs. Ry. Co.*, 193 Fed. Rep. 867 (1912) it was ruled that under the Act of 1908 the servant does not assume the risk of the master's negligence.

SIXTH POINT:

THE CIRCUIT COURT OF APPEALS ERRED IN RE-EXAMINING THE VERDICT OF THE JURY AND IN ENTERING JUDGMENT N. O. V. FOR THE DEFENDANT (257, Record):

> "The judgment n. o. v., moved by the defendant, should have been granted. The judgment below is therefore reversed, and judgment in favor of defendant is hereby directed to be entered."

This, as has been decided by this court in *Slocum vs. Insurance Co.*, 228 U. S. 364 (1913), was in violation of the Seventh Amendment to the Constitution of the United States and therefore reversible error.

That is, Slocum vs. Insurance Co., supra, has established that Federal Courts exercising their jurisdiction in the State of Pennsylvania, cannot follow the act of that State of April 22, 1905, P. L. 286, but the Federal Courts can and do follow the practice of the State courts wherever such practice is not in conflict with the Constitution of the United States for Section 914 of the Revised Statutes of the United States gives the authority to the Circuit Court to conform:

> "As near as may be to the practice, pleadings and forms and modes of proceedings existing at the time in the causes in the Courts of Record of the State."

Therefore, the Circuit Court of Appeals should have followed the practice that obtained in the State

of Pennsylvania prior to the passage of the Act of April 22, 1905, and what the law and the practice was in that State is best set forth in *Dalmas vs. Kemble*, 215 Pa. 410 (1906):

> "The court has long had authority to direct a verdict for defendant when it was of opinion that the plaintiff, even if all his evidence be believed, has failed to make out his case. But this had to be done offhand at the trial and a mistake of the judge either way resulted in delay and expense. If he directed for the defendant but on more deliberate examination or consideration came to the view that there was some evidence for the jury to pass upon, a new trial was the only remedy, while on the other hand if he refused a binding direction but later found that it should have been given, the same result followed, *for after a question has been submitted to a jury and the fact found by them the power of the court to enter a contrary judgment on the ground that the evidence is insufficient is gone. North American Oil Co. vs. Forsyth*, 48 Pa. 291; *Butts vs. Armor*, 164 Pa. 73 (81)."

In *North American Oil Co. vs. Forsyth*, supra (decided in 1864), a verdict was rendered for the plaintiff. Subsequently, on a point reserved, judgment was entered for the defendant n. o. v. On appeal, held:

> "It may be, as stated by the learned judge, in his opinion upon the reserved points, that there was nothing in the evidence from which readiness to pay on delivery could properly be inferred, but under his instructions this was a fact submitted, and, if improperly found, the remedy was a new trial. But there was error in submitting the fact of readiness to the jury in language that clearly embraced it, and after the fact was found, in entering judgment for the defendants on the ground that the evidence was insufficient."

In *Butts vs. Armor*, supra (decided in 1894), "At the close of the testimony, the court made the follow-

ing reservation, 'Whether there is any evidence upon which defendants are entitled to recover.'" That was an issue devisavit vel non. The jury found that the testatrix lacked testamentary capacity and that she had been unduly influenced. Subsequently, the court on the point reserved as aforesaid entered judgment n. o. v. on the ground that the facts did not warrant the inferences drawn from them by the jury. *Held*, that as the matters of testamentary incapacity and undue influence had been submitted to the jury, the court was bound to enter judgment on the verdict, or grant a new trial.

But the Circuit Court of Appeals, instead of granting a new trial as they had power to do, merely entered judgment on the verdict and as defendant did not reserve consideration of his motion for a new trial in the District Court until his motion for judgment n. o. v. for the defendant was *finally* disposed of, the motion for a new trial having been refused, together with the motion for judgment, it is too late under the practice of the State of Pennsylvania to grant a new trial now.

Moreover, the record as a whole shows clearly in view of *all* the different questions involved that this case was one for the jury. As the Pennsylvania Supreme Court says:

> *Devlin vs. Beacon Light Co.*, 198 Pa. 583 (1901),
>
> if
>
> "The plaintiff showed a series of acts from which the inference of negligence on the part of the defendant arose; that inference was sufficient to carry the case to the jury; having once arisen, it remained until overcome by countervailing proof; whether it was overcome was a question of fact which the court could not determine."

This court has emphatically affirmed this same doctrine in numerous decisions.

It is unnecessary to refer to these decisions specifically and in detail. They seem to be all comprehended and the general subject expounded in the case of

Kreigh vs. Westinghouse, Church, Kerr & Co., 214 U. S. 249 (1909),

where this court states:

> "Questions of negligence do not become questions of law except *where all reasonable men must draw the same conclusion* from the evidence, nor should a case be withdrawn from the jury unless the conclusion follows as a matter of law that *no recovery can be had upon any view* which can be properly taken of the facts which the evidence tends to establish."

It is respectfully submitted, therefore, that the judgment of the Circuit Court of Appeals for the Third Circuit should be reversed and judgment on the verdict originally rendered ordered to be re-entered in favor of the plaintiff-in-error.

ULYSSES S. KOONS,
VEDANTUS B. EDWARDS,
Attorneys for Plaintiff-in-Error.

INDEX.

Page.

Name of the Parties 1

Counter Statement of the Case 1

Argument 5

1. The Circuit Court of Appeals for the Third Circuit correctly held that the crew of yard engine No. 514, while working within the yard limits, were not negligent in failing to give to extra train 184 any warning of the presence of their engine on the main track 5

2. The Circuit Court of Appeals correctly held that rules 99 and 99a of the defendant company did not govern yard engine 514 17

3. The Circuit Court of Appeals correctly held that "engine 514 was a 'yard engine or other extra' within the meaning of Rule 107 of the defendant company" 36

4. The Circuit Court of Appeals correctly held that the death of plaintiff's decedent was due solely to his negligence in not observing Rule 107 42

5. The Circuit Court of Appeals correctly held that the doctrine of assumption of risk was inapplicable to this case 47

6. The Circuit Court of Appeals erred in entering judgment for the defendant n. o. v. 47

ALPHABETICAL LIST OF ALL CASES REFERRED TO, TOGETHER WITH REFERENCES TO PAGES WHERE CITED.

	Page.
Aerkfetz vs. Humphreys, 145 U. S. 418	12
Chicago, R. I. & P. Ry. Co. vs. Ship, 174 Fed. Rep. 353	10
Little Rock & M. R. Co. vs. Barry, 84 Fed. Rep. 944	7
Rosney vs. Erie Railway Co., 135 Fed. Rep. 311	8
Slocum vs. New York Life Ins. Co., 228 U. S. 364	47-48
Southern Ry. Co. vs. Craig, 113 Fed. Rep. 76	15
Southern Ry. Co. vs. Smith, 205 Fed. Rep. 360	17

IN THE

Supreme Court of the United States.

October Term, 1913. No. 389.

MARTHA YOUNG, ADMINISTRATRIX OF THE ESTATE OF PETER B. YOUNG, DECEASED,
Plaintiff in Error and Plaintiff Below,

vs.

CENTRAL RAILROAD OF NEW JERSEY,
Defendant in Error and Defendant Below.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

COUNTER-STATEMENT OF THE CASE.

Plaintiff in error's decedent, Peter B. Young, engineer of extra freight train No. 184 of the Central Railroad Company of New Jersey, defendant, was bound eastward with a train partly of coal and partly of live-stock cars from Haucks, Pennsylvania, to Jersey City, New Jersey, on the morning of October 9, 1909. The morning was foggy, so that it was not possible to see more than three or four car lengths, that

is, from 90 to 120 feet. As Young's train entered the defendant company's yard at Siegfried, Pennsylvania, a little after 8 A. M., it was running at the rate of eighteen to twenty miles an hour, at which speed it could not have been stopped within view of an obstacle on the track and was not, therefore, under control. When extra No. 184 had entered the yard limit, it ran with undiminished speed 2637 feet to automatic block signal No. 962. This signal showed clear, which indicated to the deceased engineer that the track in front, or to the east of him, was at that time unoccupied by any other engine or train, but gave no information as to what moment conditions might change and engineer Young knew that at any time a yard engine or an extra train might enter upon the eastbound main track by the crossover switch, 3062 feet to the eastward. The block signal was tested after the accident and found to be in good working order and the evidence conclusively established that it was properly placed and in accordance with standard railroad practice.

Shortly after Young's train passed this block signal, a small engine, without markers, assigned to yard service and doing work within the yard limits, crossed over from the westbound main track to the eastbound main track, on which latter track Young's extra train was coming. Before the yard engine, known at No. 514, made this movement, it was brought to a full stop on the westbound main track and the crossover switches were set by the conductor and the brakeman of the yard engine. Then, neither hearing nor seeing the approach of Young's extra train, which had not whistled at the whistling post, 745 feet west of the crossover, the yard engine moved on to the eastbound track. No regularly scheduled train was due for about twenty minutes after the yard engine began this movement, and the crew of yard engine No. 514, therefore,

did not protect themselves by flag, lantern or torpedo, but acted in reliance upon defendant company's rule No. 107, which reads as follows:

> "Yard limits will be indicated by yard limit boards. Within these limits yard engines may occupy main tracks, protecting themselves against scheduled trains. Extra trains must run through yards under control, looking out for yard engines and other extras."

Yard engine No. 514, backing eastward at the rate of six to eight miles an hour, had barely reached the eastbound track when extra train No. 184 appeared through the fog, coming at three times the speed of the smaller engine. One of the crew of yard engine 514 immediately gave a warning signal to engineer Young of extra train 184, and the engineer of the yard engine put on all possible speed, sanding the track and opening the throttle, whereas engineer Young allowed his train to run forward at full speed and it almost instantly struck the small yard engine, pilot to pilot, and drove it backwards down the eastbound track 1985 feet, until the engine of extra train No. 184 became derailed. Thereupon engineer Young jumped and was killed by the cars behind him piling up on him. His engine remained upright and the fireman, who stuck to his post, was uninjured. Even after the collision with the yard engine, engineer Young did not apply his brakes, although he could have stopped his train, if he had done so, in less than its own length, or in about 1200 feet.

The plaintiff introduced the testimony of a discharged employee as to what instructions he had himself received in reference to the meaning and application of the defendant company's rules, including rule 107. This testimony was flatly contradicted by the defendant company's rule instructor and the evidence,

by witnesses from both sides, conclusively established that the other members of the crew of extra train No. 184, including engineer Young, and the crew of yard engine 514, had been instructed that, under the defendant company's rules, the crews of yard engines in yard limits were relieved from the necessity of protecting themselves against extra trains, and that the absolute duty was imposed upon extra trains entering yard limits to be at all times under control, so as to be able to stop within seeing distance of any object on the track. It was further conclusively established that the rules and practice of the principal railroads of the country relating to movements within yard limits were similar to those of the defendant company.

The trial judge refused the defendant company's request for binding instructions, left to the jury the construction of the defendant company's rules and allowed the jury to say whether, under all the circumstances, the crew of yard engine 514 should have protected against the approach of the extra train or have given the crew of that train some warning of their presence on the track in front of it. The jury rendered a verdict in plaintiff's favor for $5430 and subsequently defendant in error filed a motion for a new trial and also a motion for judgment n. o. v. on the whole record, both of which motions were refused by the trial court; and thereupon defendant took the case to the United States Circuit Court of Appeals for the Third Circuit, upon writ of error, which court reversed the judgment of the District Court and directed that court to enter judgment in favor of the defendant, on the ground that no negligence had been shown on the part of the crew of yard engine 514, and that, therefore, no question in that regard should have been submitted to the jury. Thereupon plaintiff sued out a writ of error to this court.

ARGUMENT.

1. THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT CORRECTLY HELD THAT THE CREW OF YARD ENGINE NO. 514, WHILE WORKING WITHIN THE YARD LIMITS, WERE NOT NEGLIGENT IN FAILING TO GIVE TO EXTRA TRAIN 184 ANY WARNING OF THE PRESENCE OF THEIR ENGINE ON THE MAIN TRACK.

The statement on page 7 of the brief of plaintiff in error as to the testimony of her witnesses and as to defendant's position is incorrect. There was no testimony on either side from which the jury could have found that engine No. 514 was, at the time of the accident, a road engine, all of the testimony showing conclusively that it was a yard engine. This point will be fully dealt with in the third part of this argument.

It is true that the testimony showed that yard engine 514 did not give any warning to the on-coming extra train, until it appeared through the fog, but it is not true that that train was entitled to go on through the yard without being under control (as a scheduled train would have had the right to do when the block signal showed clear) and defendant's testimony was direct and positive to this effect. Defendant's position was and is that the crew of yard engine 514 were not obliged to give to extra train 184 any warning of their movements on the eastbound main track, since extra train No. 184 was bound, under rule 107, to run through the yard under control and already therefore, had warning of the possible presence of yard engine 514 on the track. Defendant can and does concede that the crew of yard engine 514 were not relieved by rule 107 from the duty of operating their engine with ordinary care and that they would have been negligent if, seeing or hearing the approach of extra train No. 184, they had run their yard engine

directly in its path, or, after they had discovered its approach, they had then made no effort to avoid a collision; but the position of the defendant was and is that, under rule 107, the crew of yard engine 514 were not required to protect their engine within yard limits with stop signals, such as flags or torpedoes, but were expressly relieved therefrom by this rule and that this rule, having been deliberately adopted and enforced by the defendant company and being in accordance with the standard railroad practice and approved by the expert railroad judgment of this country, the jury should not have been permitted to say whether, *in their judgment*, the crew of yard engine 514 were justified, under the circumstances of the case, in acting in accordance with its provisions. The defendant's position was and is that the construction of the defendant company's rules was a question of law for the court, and, in the absence of clear and convincing evidence of the unreasonableness or insufficiency of such rules, the court should have declared that defendant's employees were not guilty of negligence when acting in compliance therewith, and the court should have so instructed the jury.

In the Circuit Court of Appeals, the defendant cited and relied upon the cases referred to on pages 7 to 9 of plaintiff in error's brief, not as authorities upon the facts, but as establishing the principle of law above stated, and it is submitted that those cases were complete authority for the conclusion stated by the Circuit Court of Appeals and apparently conceded by the plaintiff in error on page 10 of her brief.

At page 8 of the brief of the plaintiff in error it is noted that the cases in question were all decided prior to the passage of the Federal Employers' Liability Act; but the force of this point is not evident, as that act has not changed the law as to the construction of the rules of an employer, but has only eliminated some of the defences which he enjoyed at common law.

As above stated, these cases were cited and relied upon as authorities upon the law relating to the construction and application of rules of employment; and also, incidentally, as showing the construction of rules similar to the one involved in the present case. It is believed that the law was well and correctly stated by the Circuit Court of Appeals for the Eighth Circuit in the first of these cases, namely, that of Little Rock & M. R. Co. vs. Barry, 84 Fed. Rep. 944, in which the court said (pp. 948-9):

> ". . . The skilled and experienced railroad operators who seem to have developed this theory and formulated these rules are undoubtedly more competent than jurors or judges to select and prepare rules most conducive to the safe, economical and prosperous operation of railroads. The interest of the owners of these railroads, the interest and ambition of those who operate them, alike prompt them to select and use the best and unless the rules they adopt are clearly shown to be palpably unreasonable or clearly insufficient, railroad companies ought not to be charged with negligence on account of their adoption and use. Vedder vs. Fellows, 20 N. Y. 126, 133; Enright vs. Railway Co. (Mich.), 53 N. W. 536. In our opinion there was no such proof in this case; and at the close of the trial the court should have instructed the jury that the system of rules, and practice under them, which the company had adopted, was neither unreasonable nor insufficient. The defendant in error and the other servants of the company were familiar with these rules, and the theory upon which they were based. By taking service under them without objection or protest, they assumed the risks and dangers of the theory that every employee who operates trains must beware of other trains moving in the same direction, without notice of their whereabouts, and the risks and dangers of the system of rules which was based upon this theory. Wolsey vs. Railroad Co., 33 Ohio St. 227. When a railroad company has deliberately adopted a system of rules, which have

been made familiar to its employees, and its railroad operated under them, the reasonableness and sufficiency of these rules are questions of law, and not of fact. These questions must be determined by the court, because there is no other way in which a set of rules may ever be established or adjudicated as either reasonable or sufficient. It may be said that trial judges often differ upon questions of this character. But the answer to this objection is that the appellate court will finally settle them, and in the end a substantial uniformity of decision as to the reasonableness and sufficiency of any set of rules in general use must eventually result, if these questions are left to the determination of the courts. If, on the other hand, they are remitted to the juries, their various findings can result in little less than confusion worse confounded. The decision of an appellate court becomes a precedent for the rulings of many inferior courts. But the finding of one jury is no precedent for the decision of another, and a rule that is found to be reasonable by one jury will frequently be thought to be unreasonable by another; and no criterion will ever be established by which railroad companies may measure their duties in this regard, if the reasonableness and sufficiency of their rules are to be daily submitted to new tribunals, which are governed by no precedent, and are without experience in the determination of these questions."

Another of these cases, Rosney vs. Erie Railway Company, 135 Fed. Rep. 311, dealt with the contention that the railway company had failed to provide sufficient rules and a proper system for the management of its yard in the following language:

". . . The yard rule is clear and explicit; there is no mistaking its meaning. A train occupying the main track within the limits of the yard at Honesdale is not required to protect itself by flagmen except during the time that a first class train is expected. The extra freight train, therefore, had no right to expect a flagman to give warn-

ing of the presence of the switching train on the main track. The absence of a flagman did not indicate a clear track through the yard and each train was required to take notice that another train might be approaching, and proceed with caution. In the absence of proof to the contrary, the court cannot say that this rule was unsafe or improper. It had been in use for some time and no accident had occurred because of it, no railroad expert has condemned it, and it appears to be similar in language and identical in principle to rules upheld and commended by the courts in other cases. In making these rules the effort of the railroads unquestionably is to adopt the plan which will afford the surest and safest protection to life and property. The dictates of humanity and self-interest alike impel to this course and the courts are slow to substitute their judgment upon questions of railroad management for the judgment of practical men who have spent their lives in solving such problems. No one can read the rule in question without being impressed with the fact that its purpose was to enjoin the utmost caution upon all trains using the main track in the yard. A first class train seeing no flag could run through at regulation speed, but all other trains were required to slow down and proceed under perfect control. Some of the additions and amendments suggested by counsel are plainly impracticable and have been criticised and rejected by the courts."

. . . . . .

"Counsel for the plaintiff has shown great industry in collecting authorities bearing upon the duties of the master to his employees, but we think that none of them would have justified the trial court in holding that the yard rule was inadequate or improper, or in submitting the question of its inadequacy to the jury. There was nothing to show that the rule had been ineffectual in the past and no testimony that the changes suggested in the brief would have improved it. The court in the Berrigan case, supra, says:

> " 'In the absence of some proof on the part of the plaintiff that such a rule was in operation by other roads or of persons possessing peculiar skill and experience in the management and operation of railroads, to the effect that such a rule was necessary or practicable under the circumstances, or unless the necessity and propriety of making and promulgating such a rule was so obvious as to make the question one of common experience and knowledge, the court is not warranted in submitting such a question to the jury.' "

In another of these cases, Chicago, R. I. & P. Ry. Co. vs. Ship, 174 Fed. Rep. 353, the rules governing the operation of extra trains through yard limits were almost the same in language and were identical in meaning with rule 107 of the Central Railroad Company of New Jersey. The plaintiff, who was an engineer of an extra freight train, entered one of the defendant company's yards and ran his train into a box car standing on the main track. The extra train was not under control. The trial court submitted to the jury the interpretation of the rules. This was held to be error, the Circuit Court of Appeals for the Eighth Circuit saying, in part:

> "Ship knew he was within the limits of a yard of the company in which engines were employed, Aregenta being a division point in reference to freight traffic, and he also knew of the above rules. Upon these undisputed facts, counsel for the railway company requested the court to direct a verdict in its favor. The refusal of the court so to do is now assigned as error. We think the court ought to have granted the request. The facts stated clearly show that Ship violated both of the foregoing rules made for his benefit, and therefore was guilty of negligence which directly contributed to his injuries. The non-observance of these

rules was negligence as a matter of law. Great Northern Ry. Co. vs. Hooker (C. C. A.), 170 Fed. 154; Kansas, etc., vs. Dye, 70 Fed. 24, 16 C. C. A. 604; St. Louis & S. F. Ry. Co. vs. Dewees, 153 Fed. 56, 82 C. C. A. 190; Missouri, K. & T. Ry. Co. vs. Collier, 157 Fed. 347, 88 C. C. A. 127; Nordquist vs. Great Northern Ry. Co., 89 Minn. 485, 95 N. W. 322; Scott vs. Eastern Ry. Co., 90 Minn. 135, 95 N. W. 892; Brown vs. Northern Pacific Ry. Co., 44 Wash. 1, 86 Pac. 1053.

"Rule 97 provided that extra trains within yard limits must protect themselves. Rule 16 provided that trains, when passing through station yards, must be under control expecting to find main track occupied. The physical facts that appeared as a result of the collision clearly show that the extra train did not protect itself, nor was it under control, expecting to find main track occupied. As in the case of Great Northern Ry. Co. vs. Hooker, supra, decided by this court, so in this case, the trial court seemed to leave the interpretation of the rules above mentioned to the jury as matter of fact. In reference to this practice the language used by Judge Van Devanter in the case last cited is pertinent:

> " 'The trial court treated the interpretation of the rules prescribing the plaintiff's duty in the premises as a question of fact to be determined by the jury. But we are of opinion that it was a question of law to be determined by the court. Not only were the rules in the nature of a written instrument, but they contain no terms the meaning of which was not made plain by them; and, this being so, effect should have been given to the general rule that the interpretation of a written instrument rests with the court and not with the jury. Bell vs. Bruen, 1 How. 169, 183 (11 L. Ed. 89); Goddard vs. Foster, 17 Wall. 123, 143 (21 L. Ed. 589); Higgins vs. McCrea, 116 U. S. 671, 682 (6 Sup. Ct. 557, 29 L. Ed. 764); Scanlan vs. Hodges, 52 Fed. 354, 3 C. C. A. 113; Bowes vs. Shand, L. R.

> 2 App. Cas. 455; 1 Labatt, Master and Servant, Sec. 215. Moreover, it is held by this court that the reasonableness of such rules is to be determined by the court as a question of law, and not by the jury as a question of fact. Kansas, etc., Co. vs. Dye, 70 Fed. 24, 16 C. C. A. 604; Little Rock, etc., vs. Barry, 84 Fed. 944, 28 C. C. A. 644 (43 L. R. A. 349). See, also, Scott vs. Eastern Ry. Co., 90 Minn. 135, 140, 95 N. W. 892; Bailey's Personal Injuries, Sec. 3325. And it would seem that by analogy a like holding should be made when the question is one of interpretation.' "

Plaintiff in error, at page 9 of her brief, has criticized the citation of this last case because Ship had some notice of the presence of the box car upon the track by seeing a dark streak which he supposed to be a shadow, but this case is valuable in its application to the present case because the negligence of Young, in disobeying defendant's rule 107, was the only negligence proved and, but for such negligence, the accident could not have happened. Further, the opinion of the Circuit Court of Appeals for the Eighth Circuit in the Ship case shows a complete recognition of the principle relating to the interpretation and construction of an employer's rules, which was contended for by the present defendant in the Circuit Court of Appeals and affirmed by that court.

The following language from the opinion of this court, in the case of Aerkfetz vs. Humphreys, 145 U. S. 418, 420, is also, it is submitted, appropriate and applicable to the present case:

> "The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. . . . It cannot be that, under these circumstances, the defendants were compelled to send some man in front

of the cars for the mere sake of giving notice to employees who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendants."

At pages 10-11 of the brief of the plaintiff in error it is contended that rule 107 did not fully cover the movement made by yard engine 514, but that some additional requirement can be drawn from rules 105 and 106. As to rule 105 it is to be observed that it is expressly applicable to the operation of *trains* and is not, by its terms, applicable to yard engines. The definition of a train, as given in the company's book of rules, will be found on page 77 of the record:

"An engine, or more than one engine coupled, with or without cars, displaying markers."

Plaintiff's witness, Carrigan, explained that markers were white flags carried alongside of the headlight, and Graver, the conductor of the yard engine, testified, page 93 of the record:

"Q. Were there any markers on your engine?
A. No.
Q. You only had an engine?
A. We had an engine.
Q. No cars?
A. No cars.
Q. No markers?
A. No."

In reference to other rules relating to *trains*, defendant's witness Curwin, division superintendent of the Central Railroad Company of New Jersey, testified (see Record, p. 159):

"Q. Rule 99a, on the same page, 'On double track when a train crosses over to, or obstructs the other track, unless otherwise provided, it must first be protected as prescribed by rule 99.' How does that rule apply to 514?
A. That applies to all trains, but does not in-

clude yard engines engaged in yard work within yard limits."

And, on page 163, Curwin testified:

"Q. I call your attention to the book of rules and definitions on page 7. You have heard the testimony of the conductor of engine 514?

A. Yes.

Q. That his engine did not have any markers?

A. Yes.

Q. Under the definition of 'train' do I understand that that was a yard engine, or was it a train?

A. It was a yard engine."

And, on page 177, while Curwin was testifying, see the following:

"THE COURT: There is a little inconsistency there. Does not rule 99 (a) speak of a train?

MR. DICKSON: I think that is right.

THE COURT: That is a train under the definition, which is with markers?

MR. DICKSON: Yes.

THE COURT: And 107, then, applies to yard engines, which is not a train, and 99(a) applied to a train, and if this was not a train, under the definition, it would not come under that rule?

MR. DICKSON: Yes.

THE COURT: I ask you that so that both sides may know.

By MR. DICKSON:

Q. You have heard the judge's question. Will you answer his Honor? Explain about that.

A. Rule 99 (a) requires trains to cross from one track to another, to protect themselves, but does not apply to yard engines when they are working within yard limits."

It is obvious for the same reason that rule 105, relating to *trains*, was not applicable to yard engine No.

514. Rule 105, further, applies only to conditions not otherwise provided for by the rules.

It is submitted, likewise, that rule 106 cannot be taken to add to the obligations of the crew of yard engine 514, because there was no doubt or uncertainty in the case. Rule 107 gave them the right to occupy the main track within yard limits, when no scheduled train was due, without protection. That rule, therefore, covered the case and it is submitted that the trial court was in error in permitting the jury to pass upon the question whether some form of protection should have been used.

It should be noted that the defendant does not contend that rule 107 exempted the crew of engine 514 from the exercise of *ordinary care* in the operation of their engine, but it is submitted that the record is barren of any evidence that could possibly be construed as showing reckless or negligent operation of the engine. The only matter of which the plaintiff in error complains was the failure to protect the yard engine, and thus warn the extra train by some stop signal, and this, under rule 107, the crew of yard engine 514 were not required or expected to do. The Circuit Court of Appeals, therefore, rightly said that the jury should not have been permitted to say that the absence of such protection constituted negligence.

Defendant in error can cheerfully concede the correctness of the decision in the Craig case (Southern Ry. Co. vs. Craig, 113 Fed. Rep. 76) upon which the principal reliance of the plaintiff in error is placed. See pages 11-13 of her brief. It is submitted that there is nothing in the Craig case which militates in any way against the decision of the Circuit Court of Appeals for the Third Circuit in the present case.

The Craig case was one in which, on the evidence, the jury could have found that the extra train, while entering and running through the yard, was being oper-

ated at a speed of four miles an hour and was entirely under control; also, that the switch or yard engine was being operated against the current of traffic at the rate of some fifteen miles an hour and that, in spite of the fact that the two trains came in sight of each other when fifty yards apart and that the engineer of the extra train blew his whistle and reversed his engine, the crew of the switching or yard engine made no proper or sufficient effort to avoid the collision, or else that that engine was going at such a rate of speed, against the current of traffic, that avoidance of the collision was impossible. The jury could, therefore, have found from the evidence that the extra train had exercised all possible precautions, while the switching or yard engine had exercised none at all and was not being operated with ordinary care. It must be evident that if those facts were found by the jury, the plaintiff was entitled to recover.

If, on a clear day, yard engine No. 514 had been deliberately run from the westbound on to the eastbound track in the face of an oncoming train and had immediately collided with it; or, if, on a foggy day, engine 514 had been run onto the eastbound track, without any effort on the part of the crew, by listening, to ascertain if a train were coming; or, if the crew of engine 514, after the appearance of extra train No. 184, had made no effort to avoid being run into by it, then it would be conceded that the yard engine had not been run with ordinary care and the jury might properly have been permitted to find that the crew were guilty of negligence. In the present case, however, the evidence is uncontradicted that Young's extra train was not running under control, but was going at a speed of eighteen to twenty miles an hour. It is also uncontradicted that yard engine No. 514 did not come out on to the eastbound track, until the precaution of listening for other trains had been exercised,

and, further, that when the presence of extra train was discovered, everything possible was done to avoid being overtaken and run into by it. This case and the Craig case are, therefore, clearly distinguishable.

In the case of Southern Railway Company vs. Smith, 205 Fed. Rep. 360, cited by plaintiff in error at pages 15-16 of her brief, it is obvious that the engineer was not using ordinary care in the operation of his engine. He was not maintaining a lookout. If he had been keeping a lookout ahead, he would have seen the switch tender on the track. The engineer must, of course, be charged with the knowledge of that which he would have learned by the use of ordinary observation, and if, knowing the switch tender was on the track, he made no effort to avoid running over him, it is obvious that this was negligence for which the railroad company would be liable. The defendant in error has no quarrel whatever with the Smith case.

2. THE CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT RULES 99 AND 99a OF THE DEFENDANT COMPANY DID NOT GOVERN YARD ENGINE 514.

It has already been seen, under the first point, that the rules 99 and 99a do not, by their terms, apply to the movements of a yard engine within yard limits, but are rules governing the operation of *trains,* but plaintiff in error contends that the company had, by its instructions, construed rules 99 and 99a as applicable to yard engines, while working within yard limits, and quotes the testimony of Bartlett, the former rear brakeman of Young's extra train (not decedent's fireman, as stated by plaintiff in error at p. 18). It would, perhaps, not be material to refer to the character of this witness' testimony (that being a matter for the jury's consideration) if plaintiff in error had not, at the top of page 20, repeated a statement of Bartlett, the falsity of which was demonstrated in the lower courts. Bart-

lett was discharged for insubordination, not after *fourteen* hours of duty, but after *seven*.

When his statements on page 221

"Q. You know why you were discharged, do you not?

A. No, sir.

Q. You just got your discharge and no explanation as to why it came to you? You want the jury to believe that, do you?

A. I refused, after being our fourteen hours, to fire up 514 engine to Bethlehem.

Q. You refused to obey orders, did you?

A. Yes, sir."

and on page 222

"Q. You say you had been out fourteen hours up to the time of this accident?

A. Yes, sir."

are compared with his statement on page 27 of the Record

"Q. Where did you get this train?

A. We were called at eleven o'clock Friday night for one o'clock, to leave, to go to Haucks."

and when it is seen by his own testimony (Record, p. 26) that the accident occurred about 8 A. M. on Saturday, or only seven hours after he went on duty, it is obvious that Bartlett's testimony should not be given any greater weight than properly belongs to it. It may be that Bartlett had noticed the use of the word "trains" in counsel's question, quoted on page 19 of plaintiff's brief, when he answered that he was instructed to conform to rule 99a. It is to be noted, too, that Bartlett's testimony was flatly contradicted by the defendant's rule examiner: Record, page 223. But, after all, the testimony of Bartlett would seem to be immaterial, for Engineer Young was instructed by Brobst to conform to rule 107, the latter testifying at Record page 209:

"Q. Did you examine him on that rule?

A. I am positive I did; yes, sir. That I would consider and always did consider one of the important rules. It is a rule that is important to an engineer, conductor or trainman of any description. I never did skip a rule of that kind. I am positive of that.

Q. Did you explain to him the meaning of rule 107?

MR. KOONS: What did he tell him?

By MR. DICKSON:

Q. What did you tell him about rule 107?

A. We have a question on rule 107?

MR. KOONS: Ask him what he told him.

By MR. DICKSON:

Q. Did you ask him that question, or what did you ask?

A. I will give you the question: 'How must all extra trains run through yard limits?'

Q. That was the question?

A. Yes, sir."

Record, page 210:

"Q. The answer to that is, what?

A. 'Under control, looking out for yard engines and other extras.'

Q. Did you explain to him what 'Under control' meant?

A. Always do.

MR. KOONS: I move that that reply be stricken out.

By MR. DICKSON:

Q. I asked you whether you did explain to Peter Young what 'Under control' meant.

A. I did.

Q. What does 'Under control' mean?

A. It means that an engineer when he is under control should be able to stop within the distance he can see."

Carrigan, plaintiff's own witness, was perfectly clear in his understanding of the rules, testifying that rule 107 governed the matter according to his instruc-

tions from Brobst. His testimony can, with profit, be pretty fully quoted.

Record, page 65:

"Q. As compared with this shifting train that came out at the cross-over at Siegfried, which train had the right of way?

A. The shifting train.

Q. You say it had the right of way?

A. Yes, sir.

Q. Why do you say that?

A. Because the rule gives them the right of way in the yard."

Record, page 66:

"Q. The right of way in the yard?

A. Yes.

Q. What is their duty with reference to protecting themselves, or what were they to do when they got out on this main track, on this left-bound track?

A. What were they to do? They were not to do anything.

. . . . . .

Q. Which is the superior train as compared between those two, the shifting train, or your train?

A. The shifting train in the yard limits.

Q. Within the yard limits?

A. Yes.

Q. When you say 'superior,' what do you mean by that?

A. She has the right over extra trains."

Record, page 69:

"Q. You were running as an extra train?

A. Yes, sir.

Q. You did not have the right of way, then, in the yard limits?

A. No, sir."

Record, page 70:

"Q. You said that the shifting engine had the

right of way and this train did not have the right of way inside the yard limits?

A. Yes, that is what I said.

Q. Do you base that on rules of the company or on instructions?

A. The book of rules.

Q. You base that on the company's book of rules?

A. Yes, sir.

Q. Are those rules in force?

A. Yes, sir.

Q. Did those rules govern all the management of that train?

A. Governed the management of the whole road.

Q. Did you have to pass an examination on those rules?"

Record, page 71:

"A. Yes, sir.

Q. Do you know whether the engineer had to pass an examination?

A. He had to; yes, sir.

Q. You had been running as conductor, you say, for about six years?

A. Yes.

Q. And under the rules of the company the yard engines had the right of way within the yard limits?

A. Yes.

Q. Did you ever see, before this accident occurred, any case where a yard engine was on the main tracks, within the yard limits, when an extra train was coming along? Did you ever see the case of a yard engine being inside the yard limits, on the main track?

A. Every day I see it when I am working.

Q. Every day you see it?

A. Yes, sir.

Q. It is the common ordinary running of the road?

A. Yes, sir.

Q. So that when your train comes along and enters the yard limits, you know there might be a yard engine in there in front of you?

A. We have got to look out in the yard limits with an extra train.

Q. When you have an extra train?

A. Yes."

Record, page 72:

"Q. When inside the yard limits, with an extra train, you are governed by your yard limit rules. Is that it?

A. Yes, sir.

Q. You were not a scheduled train then?

A. No.

Q. You did not have to make any definite time?

A. We were an extra train.

RE-DIRECT EXAMINATION.

By MR. KOONS:

Q. You say you must look out for yard trains?

A. Yard trains; yes, sir.

Q. Does that mean, when you come into the yard limits you are to stop your train?

A. No, sir.

Q. You proceed, do you not?

A. Proceed.

Q. According to what?

A. According to how far you can see ahead, with safety.

Q. And according to signals?

A. Yes, sir.

Q. And the semaphores are the signals that the engineers go by?

A. Outside of the yard limits.

Q. You are familiar with the book of rules?

A. I have gone through them. I have been examined on them.

Q. I show you a book of rules of the company. Will you show me anywhere in that book of rules that these semaphore signals do not apply in the yard limits just the same as outside of the yard limits?

A. I don't know about that. I never saw that, but there is rule 107 in that book that will show you where the yard engine has the right of way over the extra trains, to protect herself against scheduled trains."

Record, page 73:

"Q. Do you mean to say there were no rules with reference to protecting a train like yours, against the yard trains, being out on the track?

A. The extra train is supposed to look out for the yard engine, according to that rule, as far as I can understand it.

Q. But you are supposed to keep on running when you come into the yard limit?

A. We certainly are.

Q. What is it you are to look out for?

A. To look out for everything, that would be in the yard.

Q. What are those semaphores in the yard for, then?

A. What are they in the yard for?

Q. Yes."

Record, page 74:

"A. Just the same thing as any place else, I guess.

Q. The same as any place else?

A. Yes.

Q. To give signals?

A. Warning.

Q. To the trainmen?

A. To give warning.

Q. To give warning?

A. Yes.

Q. And if those semaphores showed white, when Mr. Young came along, what did that indicate?

A. That indicated——

Q. A clear track?

A. A clear track there then.

Q. It indicated a clear track there then.
A. Yes.

. . . . . .

"Q. So that if those semaphores were white, that meant there was a clear track?
A. A clear track at that time when he passed it.
Q. At that time, of course, and if he had a clear track it was within his duty to go ahead?
A. As far as he could see, with safety.
Q. He was not obliged to stop every few feet to feel his way?
A. No, sir; he was not."

Record, page 76:

"Q. Did I understand you to say that through the yard limits the signals did not apply to a train like yours?
A. It does not protect them any.
Q. Isn't this what you mean, that in addition to going by the yard signals, any engineer of a train like yours was also to watch out for other trains?
A. Other trains run under control through the yard."

Record, page 77:

"Q. But he is guided by signals?
A. That is more to protect a schedule train, signals through the yard limits.
Q. Are they not also to protect trains like yours?
A. No, it does not give him any right to run fast through the yard.
Q. Show me in the book of rules where that is so stated.
A. 107 covers that whole thing, so far as I can see.
Q. That is your interpretation of rule 107?
A. Yes, sir.
Q. Did you notice whether rule 107 said anything about signals?

A. No, it does not.

Q. That is merely your own interpretation of it?

A. Yes, sir; that is my own interpretation.

Q. I believe you said that when the semaphore shows white, it shows clear track?

A. Shows clear track.

CROSS-EXAMINATION.

By MR. DICKSON:

Q. This rule had been explained to you, had it not?

A. Yes, sir.

Q. You understood the practice under the rule?

A. Yes, sir."

Record, page 78:

"Q. Do I understand you to say that the schedule train has this right of way through the yard as well as outside of the yard limits?

A. Just the same thing.

Q. But the extra train, when it reaches the yard limits, loses its right of way and must run under control?

A. They have to look out for everybody on an extra train.

Q. When you say run under control what do you mean?

A. To run under control is that you can stop in the distance you can see.

Q. Must be able to stop in the distance you can see?

A. Yes, sir.

Q. If you are running at eighteen to twenty miles an hour and the fog is such that you cannot see more than three or four car lengths, can you stop within the distance in which you can see?

A. No, sir."

Record, page 79:

"Q. When you say the schedule train has the right of way what controls it in its running when it comes into the yard?

A. Clear boards.

Q. And the schedule train then relies on the boards?

A. Yes, sir.

Q. But the extra train, you say, has no right to rely on the boards?

A. No, it has not.

Q. Under the yard-limit rule?

A. Under that rule."

Record, page 80:

"RE-DIRECT EXAMINATION.

By MR. KOONS:

Q. Show us in the book of rules where it states that the extra train such as yours had no right to rely upon signals.

A. I cannot. That is all I have got for it, rule 107.

Q. That is the rule covering all these things in your mind?

A. It covers that.

Q. And that is your own interpretation of that rule?

A. Yes, that is the way I was instructed.

Q. Who instructed you to that effect?

A. My rule instructor.

Q. When?

A. Six years ago when I went to Bethlehem.

Q. What is his name?

A. Charles Brobst.

Q. What did he tell you?

A. Told me what I have just told you.

Q. Tell me the words he used.

THE COURT: I do not think that is proper.

By MR. KOONS:

Q. You say that is the only rule that covers that?

A. That is all."

Conductor Graver, of yard engine 514, also governed himself by rule 107. Record, page 88:

"Q. Did you have any flag out to the westward?

A. No.

Q. Why not?

A. The rules did not call for it.

Q. By the rules not calling for it, what rule do you refer to?

A. Rule 107.

Q. When you became conductor, how long ago has that been?

A. Twenty-four years."

Record, page 89:

"Q. How long do you recall, had rule 107 been in force?

A. Rule 107 has been in force, I do not know just exactly but it must be eight or nine or ten years, something like that.

Q. Had you been instructed in this rule; if so, by whom?

A. We were supposed to know all the rules and be familiar with them, in the book of rules.

MR. KOONS: I move that the answer be stricken out.

By MR. DICKSON:

Q. Had you been instructed in the rule, and if so, by whom?

A. No, sir; been instructed by the book of rules.

Q. You were given the book of rules?

A. Yes, sir; by the company; the company furnished the book of rules for me to live up to."

Record, page 93:

"Q. Then your engine did not have the right of way over Mr. Young's engine, did it?"

Record, page 94:

"A. Yes; we were working in the yard.

Q. Do you know of any rule in your book of rules which gives you the right of way under those circumstances?

A. Rule 107.

Q. That is your own interpretation of rule 107, is it not?

A. While we are working in the yard, we have the right.

Q. That is your own interpretation of rule 107?

A. Yes, sir.

Q. You had no instruction on that rule?

A. No; what the book calls for there, that instruction."

As engineer Young, of the extra train, had been instructed to conform to rule 107 and conductor Graver of the yard engine understood that this rule governed, it is submitted that even if Bartlett could be believed and Brobst had, in a moment of temporary aberration, told him to comply with rule 99a and not with 107, when working on a yard engine, that instance of a mistake in instruction can have no bearing on the issue in this case.

Plaintiff's counsel (brief, p. 20) appear to see some special significance in the fact that defendant did not call upon the various members of the crew to contradict Bartlett's testimony as to the instructions he had received, but how could they know anything about that? Defendant did call the only man who knew what instructions were given Bartlett and (much more to the point) what instructions were given to engineer Young. The testimony of plaintiff's own witness, Carrigan, and that of Graver had already shown what was the meaning and application of rule 107, both under the company's instructions and practice, and there was nothing to prevent plaintiff's counsel, in cross-examination of brakeman Ryner, from going into his understanding of the rules and practice thereunder, Ryner having testified fully as to what was done by the crew of yard engine 514 on this occasion (Record, pp. 102-107). Fireman Decker was plaintiff's own witness and could just as well have been called by plaintiff in rebuttal of Graver. As to brake-

man Decker, of the yard engine, he had been sent by Graver down the westbound track, to prevent trains which might be coming on that track from interfering with his reaching a side track on which he was about to place a car of brick (Record, pp. 100-101), and this man was left down there, to be picked up as the yard engine came down on the eastbound track (Record, bottom of p. 102), and consequently knew nothing about the accident. For this reason he was not called.

The attention of this court is also directed to the testimony of William H. Higgins, the defendant company's signal engineer, who had been twelve years in that position. Record, page 148:

> "Q. With reference to what trains do you place these signals upon the track, along the side of the track?"

Record, page 149:

> "A. We place those signals to give a good braking distance for scheduled trains."

. . . . . .

> "Q. By braking distance you mean the distance in which a man can apply his brakes sufficient to bring his train to a stop?
>
> A. Yes.
>
> Q. Without any unusual or unnecessary or forcible application?
>
> A. Yes."

. . . . . .

> "Q. You say this is to give the scheduled trains a proper distance?"

Record, page 150:

> "A. Yes.
>
> Q. What is the purpose of those signals in connection with extra trains?
>
> A. Those particular signals, the virtue of the signals is taken away by the yard limit rules. It does not amount to anything as a clear signal. Of

course, if it is in a stop position, we compel the trains to stop there.

Q. How do you mean the virtue is taken away within the yard limit rules? Is that so as to scheduled trains?

A. No; for extra trains.

Q. For extra trains?

A. Yes.

Q. Just explain that to the jury so that they can understand it.

A. Extra trains have no right to run at a speed that they cannot be prepared to stop, and a clear signal does not tell them they have that right. They are apt to find something in the block after they pass a clear signal.

Q. The clear signal tells them at the time they approach the signal——

A. At the time they approach the signal it is clear, but it does not say it will be clear one second or one minute or one hour after that. They cannot tell what conditions they are apt to find. In other words, the conditions are apt to change just as they pass it, or in their face.

Q. Within yard limits?

A. Within yard limits; yes, sir.

Q. In the case of a scheduled train, how does it work?

A. A scheduled train, the yard engines would have no right on the track, under schedule time. If they did go on the track they would have to protect themselves with a flag.

Q. So that the signal being clear gives a scheduled train the right of way?"

Record, page 151:

"A. Gives a scheduled train the right through that yard, the same as any other point, because they have yard rights."

. . . . . .

"Q. Will you show me in the book of rules of your company anything to give Mr. Young any indication that there was such a designation between his train and a scheduled train?

A. Rule 107."

Record, page 153:

"Q. In rule 107 we read that 'Extra trains must run through yards under control, looking out for yard engines and other extras.' Do you mean to say by that that an extra train, like Mr. Young's, had to stop every few minutes as he came through this yard?

A. It had to come there prepared to stop.

Q. For what?

A. For anything that he could find, any obstructions.

Q. Anything he had notice of?

A. Yes, sir; anything that he could see.

Q. Anything that he could see?

A. Yes, sir; that would interfere with his passage.

Q. Anything that he could see or that would interfere with his passage?

A. Yes.

Q. But he was not to stop until he did see anything that interfered with his passage, would he?

A. No. He could be prepared to stop. That is all.

Q. He had a live stock train?

A. He had the right to go through the yard, if he did not see anything that obstructed his view.

Q. He is expected to make good time, is he not?

(Objected to.)

A. Not at that point. Under those conditions he was not supposed to make good time. In foggy weather he had to be prepared to stop in a very short distance."

Record, page 155:

"Q. Suppose they are going under control, are not they entitled to some warning of other trains on other tracks?

A. No, sir.

Q. They simply go ahead?

A. They simply go ahead.

Q. In foggy weather and clear weather, and all kinds?

A. To be prepared to stop if anything comes, any obstruction in their way.

Q. You have no rule, then, to protect them in foggy weather, or anything of that kind?

A. No, sir.

RE-DIRECT EXAMINATION.

By MR. DICKSON:

Q. You said that means when running under control, that they must be prepared to stop in time to avoid hitting anything they see in front of them?

A. Yes, sir.

Q. In foggy weather, or where they cannot see so far as they can in clear weather, how does that rule 107 affect them as to speed?"

Record, page 156:

"A. They must run that much slower. They must be prepared to stop under all conditions, in range of vision.

Q. But if the range of vision under that 107 rule is one to two hundred feet, within what space must they be able to stop?

A. Within one or two hundred feet."

. . . . . .

"By MR. DICKSON:

Q. Do you know what the company's interpretation of these rules is?

(Objected to.)

A. They are the same as mine, as far as I can understand."

Upon this same point testified also Edward E. Curwin, the company's division superintendent, who had held that position nearly ten years.

Record, page 157:

"Q. And as division superintendent what do you have to do with the operating of trains?

A. I have all to do with the operation of trains.

Q. You are the boss of everything. Is that what you mean?

A. Yes.

Q. What rule, in your understanding of the rules of the company, governs the question of operation through yard limits?

A. Rule 107.

Q. To what trains does that rule apply?

A. To extra trains.

Q. What kind of a train was Young running?

A. An extra train.

Q. What sort of work was engine 514 doing at that time?

A. Yard work.

Q. Which had the right of way through that yard or on that track?

A. Engine 514, the yard engine.

Q. On what do you base that?

A. Rule 107.

Q. Is that your own interpretation of it, or is that the company's interpretation?

A. That is the company's interpretation, and that is the standard interpretation of all railroads.

Q. All railroads?

A. All railroads that use that rule.

Q. Then rule 107 is not, then, peculiar to your company? Rule 107, then is not peculiar to your company?

A. No.

Q. What is it based on?

A. The American Railway Association rules."

Record, page 165:

"Q. What rule or rules in your opinion governed the operation of engine 514 and 184?

A. Rule 107 at that point.

Q. At that point?

A. Yes.

Q. And why is that?

A. Because of the defined yard limits. Under rule 107 engine 514 could use the main track without flag protection—that is, keeping clear of scheduled trains. Extra trains must pass through the yard limits under control, looking out for yard en-

gines and other extras. Being under control, they can enter the yard limits, prepared to stop within seeing distance.

Q. And if it is foggy weather?

A. They must be governed by that condition.

Q. Does that affect, then, the rate of speed at which they can run their engine?

A. It does.

Q. How does it affect it?

A. If the view was short they would have necessarily have had to run slower, because they would have a shorter distance to stop."

Record, page 169:

"Q. The latter part of rule 107 says, 'Extra trains must run through yards under control, looking out for yard engines and other extras.' Will you tell us how he was to look out for yard engines and other extras?

A. They must move at a rate of speed which they can stop within a distance they can see ahead of them.

Q. In a distance they can see ahead of them?

A. Yes. In other words, they must run so that they can stop short for any obstruction that there may be on the track.

Q. That is your interpretation of that rule?

A. That is the company's interpretation of the rule. That is the standard interpretation of the rule."

Record, pages 174-175:

"Q. Rule 99 (a), on page 21, reads as follows; 'On double track, when a train crosses over to or obstructs the other tracks, unless otherwise provided, it must first be protected as prescribed by rule 99, in both directions on that track.' As far as the language of that rule is concerned, does that show it applies to yard limits, or not?

A. That applies to all trains and engines on any part of the road, except to yard engines working within the prescribed yard limits.

Q. Does it say so in the rule, any exception made there?

A. Rule 107 takes care of that.

Q. Is there any exception made here, where this rule is given, 99 (a)?

A. There is no exception.

Q. No exception made there at all, and that rule refers to rule No. 99, where it says that they must protect the hands by a flag or torpedoes, as the case may be?

A. Yes."

Record, pages 176-177:

"By Mr. Dickson:

Q. I call your attention to that rule 99 (a) on page 21, and especially to the language 'unless otherwise provided.' You said a little while ago in cross-examination that there was no exception?

A. So far as all road trains are concerned, there is no exception.

Q. Road trains?

A. Except as otherwise provided. That permits a yard engine, within yard limits, to cross from one track to the other, clearing the schedule trains.

Q. Then rule 107 is the other provision that harmonizes and fits in with this rule?

A. Yes.

By Mr. Koons:

Q. That is your interpretation?

A. That is the company's interpretation."

In view, therefore, of the testimony that was given, Bartlett's being the only evidence as to any instructions on the meaning and application of the defendant's rules that was opposed in any way to the overwhelming weight of the testimony that rule 107 was the controlling one in this case, the statement by plaintiff's counsel, at the bottom of page 20 of the brief, as to having "the clear, unequivocal testimony that the crew of 514 disobeyed the defendant's direct instructions to follow rules 99 and 99 (a) and were

guilty of negligence," seems about on a par with that, at the top of page 20, as to Bartlett's "being on duty for fourteen hours."

The suggestion, also, made on page 20 of plaintiff's brief, that Brobst did not know the practice in the Siegfried yard is without any foundation in the evidence (Record, pp. 223-224).

3. THE CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT "ENGINE 514 WAS A 'YARD ENGINE OR OTHER EXTRA' WITHIN THE MEANING OF RULE 107 OF THE DEFENDANT COMPANY."

Plaintiff's brief endeavors to establish that engine 514 was not a yard engine within the meaning of rule 107, because, during a part of the day, it was engaged in road work and its crew were paid road wages. It is clear, however, from the evidence in the case, that an engine may change its character several times during a day, depending upon the kind of work it is doing at the time, whereas the wages of its crew will be road wages or yard wages depending upon what is the major part of their work. The engine 514 was a small engine (Bartlett, p. 38):

> "Q. What kind of an engine was it that came out from the crossover?
>
> A. It was a small one, as we usually call a gunboat engine.
>
> Q. Much smaller than the other engine?
>
> A. Yes, sir.
>
> Q. Lighter?
>
> A. Yes, sir."

and Decker, Record, page 50:

> "Q. Which was the larger engine?
>
> A. Our engine.
>
> Q. And how much larger?
>
> A. Oh, I judge about half as big again, something like that. I could not just tell.

Q. That is near enough. You say half again as big. This was a small shifting engine, the one that was coming at the crossover?

A. A small engine, yes.

Q. Did it have any cars to it?

A. No, sir."

and was constantly referred to by counsel for plaintiff in the earlier part of the trial, as a "shifting engine" and its crew, as a "shifting crew" (Record, pp. 36, 39, 50, 51, 65, &c.).

Plaintiff's brief quotes but a part of Carrigan's testimony as to the character of the engine, and omits the following (Record, p. 75):

"Q. Do you know whether this was a yard engine at this time?

A. It was supposed to be; yes, sir."

Record, page 76:

"Q. Or what character of train it was at the time you do not know?

A. I know it was a shifting engine at that time."

From Graver's testimony, the plaintiff failed to quote (Record, p. 95):

"Q. Were you not through with your yard work at this time?

A. I do not know whether they wanted to use us at the lower end or not, at Northampton or the lower end of Siegfried; have to get orders there to drill.

Q. Did you tell us what you were going to Catasauqua for?

A. To drill.

Q. You were through with your work in this yard at this time, weren't you?

A. As far as I know, unless they stopped us again.

Q. But they did not; you had no orders to stop?

A. Had orders to see whether there was any other work to do before we would leave there, yes.

Q. Had you received such orders?

A. Not yet; we were not there to receive them.
Q. Where would you have gotten them?
A. At the station there, or Northampton station."

Graver's testimony, quoted at page 22 in plaintiff's brief, shows that this engine was doing "a yard engine's work." Therefore, under the definition in defendant's book of rules (Record, p. 163), *it was a yard engine.* At the conclusion of the quotation from Graver by the plaintiff (see p. 23 of Plaintiff's Brief), Graver said the engine was "an extra yard engine." It is submitted that, under rule 107, it makes no difference whether the engine was entirely and exclusively a yard engine, or whether it was an extra engine that sometimes did yard work, since, during the time that it was assigned to yard service and working within yard limits, it was a yard engine.

The quotation from Bartlett's testimony, on page 23 of plaintiff's brief, is from testimony which appears to have been stricken out (see Record, p. 84), but, as the record is not entirely clear on this point, it should suffice to say that the work of drilling or placing cars on the siding of the Cement Works, in the Siegfried yard, was obviously yard engine work.

Plaintiff (Brief, p. 23) next quotes from Curwin. Nobody could have been more positive as to the character of this engine, in the following testimony not quoted by the plaintiff (see Record, p. 163):

"Q. I call your attention to the book of rules and definitions on page 7. You have heard the testimony of the conductor of engine 514?
A. Yes.
Q. That his engine did not have any markers?
A. Yes.
Q. Under the definition of 'train,' do I understand that that was a yard engine, or was it a train?

A. It was a yard engine.
Q. Do you know then what it was?
A. I know it was a yard engine."

. . . . . .

Q. You say this was a yard engine under the definition on page 9, do you?
A. I do."

See also Record, page 171:

"Q. You say this was a yard engine. Do you know what this yard engine was doing this day?
A. It was doing general yard work at that place. It was doing general yard work at Siegfried."

Record, page 172:

"Q. How do you know?
A. Because it was working there.

. . . . . .

Q. This engine had varied duties to perform, had it not?
A. It had. The crew did and the engine.
Q. This engine?
A. Yes.
Q. They used it, among other purposes, to carry workmen back and forth on the main line, did they not?
A. Yes.
Q. Do you know, as a matter of fact, that on this day they were through with the yard work, and were out on the main track, going back to Catasauqua, or some point on the line?
A. I do not.
Q. Do you deny it?
A. I don't know that they were through with the yard work.
Q. You don't know whether they were through or not?
A. No, and if they were through, it would not have made any difference.
Q. Why not?
A. Because they were within the yard limits,

and that engine is assigned to yard service at that point.

Q. Even if they were on their way to some other point, to do other work?"

Record, page 173:

"A. They still have the rule 107 to protect them while they were in these yard limits.

Q. That is your interpretation?

A. That is the company's interpretation.

Q. That is your interpretation?

A. It is the standard interpretation."

The quotation from page 181 (Plaintiff's Brief, p. 23) is not complete. The following very important testimony was omitted (Record, p. 181):

"Q. As a matter of fact, is what you mean by a yard engine an engine that has work confined exclusively to yard limits? Is not that what you mean a yard engine?

A. No, an engine assigned to service within the yard limits for over ten minutes or six hours is a yard engine when it is there, and is protected by the yard limit rule 107.

Q. That is, it is an engine assigned to yard service, and when it is assigned to different kinds of service, as this engine was, to road work, then it is not a yard engine?

A. It is a yard engine when it is working within the yard limits.

Q. The mere fact that it is working within the yard limits, makes it a yard engine?

A. Yes.

Q. No matter what kind of cars it had?

A. When a train reached Siegfried with its carriers, the conductor would take in his orders to the agent, as to where he was to require them——

Q. How do you know this?

A. It was testified to yesterday.

Q. Then you are just telling us what somebody else said?

A. And it immediately became a yard engine.

Q. You are testifying to what you heard somebody else say, not your own knowledge?

A. I make those assignments. I know pretty near what they have to do."

The final answer of Curwin quoted by the plaintiff (Brief, p. 24), was, of course, made in reference to the rate of wages paid to the crew of the engine and not as to the character of the engine at the time of the accident. As most of the time was spent out on the road the crew were paid road wages, but, while the engine was in the yard, engaged in yard work, it was a yard engine. The quotation from page 179 (Plaintiff's Brief, p. 24), omits the following:

"Q. And does that have any relation to the work which they are doing?

A. No, it does not.

Q. Please state whether or not the same engine may be regarded as a road engine or as a yard engine at different times during the day.

A. It may.

Q. How does that apply to engine 514?

A. It would apply to engine 514.

Q. At the time it was in the yard limits, and was crossing this crossover, where this other train came down, 184, what was it at that time?

A. It was a yard engine."

The quotations from Graver's testimony, pages 86 and 91 of the record, on pages 24 and 25 of the plaintiff's brief, should be read in connection with Graver's testimony on page 95 of the record, quoted above in this brief, showing that Graver had not yet been released from yard work and could not tell whether he would be given further work in the yard until he reached Northampton, the lower end of the Siegfried yard.

The defendant, therefore, absolutely denies the claim of the plaintiff that this was not a yard engine (Plaintiff's Brief, p. 26), and it is submitted that there is no question of fact involved in reference

thereto, nor can defendant conceive of any proper objection, as a matter of railroad operation, to having yard engine 514 cross over from the westbound to the eastbound track, within yard limits, and continue down the eastbound track throughout the entire limit of the yard, at a rate of speed consistent with control under the weather conditions, and without any other warning to extra train 184 than what it already had by reason of the yard limit board. It is submitted, therefore, that, as a matter of law, the Circuit Court of Appeals but did its duty under the testimony in this case in holding that engine 514 was, at the time of the accident, a yard engine, governed by and entitled to the protection of rule 107.

4. THE CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE DEATH OF PLAINTIFF'S DECEDENT WAS DUE SOLELY TO HIS NEGLIGENCE IN NOT OBSERVING RULE 107.

Plaintiff's argument under this fourth point rests principally upon the testimony of Bartlett (Record, p. 217 ff). When read carefully it will be seen that Bartlett testified, under questions of plaintiff's counsel, that during the fifteen months of his employment he had been on extra trains going through yard limits and that he had generally done so at from fifteen to twenty miles an hour. The witness may have intended to say that he did this both in clear and foggy weather, but he did not in fact do so, his testimony on this point being (Record, p. 219):

"Q. You have also been on extra trains going through yard limits?

A. Yes, sir.

Q. You have gone through in all kinds of weather, I suppose?

A. Yes, sir.

Q. Clear weather and foggy weather?

A. Yes, sir.

Q. What was the customary rate of speed?
A. When we had the clear boards we generally used to go through there always fifteen or eighteen or twenty miles an hour.
Q. With trains of this description Mr. Young had that day?
A. Yes, sir."

Record, page 220:

"Q. How often did you do that?
A. Every time you had a clear board.
Q. Every time you had a clear board?
A. Yes, sir.
Q. How often had you occasion to go through this yard especially with an extra train?
A. Two or three times a week, Mauch Chunk or Jersey City.
Q. During your fifteen months of employment with the company?
A. Yes, sir."

Since fifteen or twenty miles an hour would undoubtedly be running under control, in clear weather, that naturally would be the customary speed through yards and it is submitted that the witness is not to be presumed to have meant that the trains on which he ran had customarily violated rule 107. That he did not intend his testimony to be so interpreted was shown by his cross-examination, as follows:

Record, pages 220-221:

"By Mr. Dickson:
Q. What rule did you interpret as giving you the right on extra trains to run through the yard at twenty miles an hour?
A. They generally all did it.
Q. What rule do you interpret as giving you that right?
A. No rule at all.
Q. You say you were instructed on rule 107 and examined on it?

A. Yes, sir.

Q. You disregarded that rule, did you?

A. No; not as long as we had the boards.

Q. You disregarded that rule by running through there at eighteen or twenty miles an hour through fogs. That is what you want this jury to believe, that you were in the habit of disobeying that rule?

A. We often went through. He asked how often we went through, and I said very near every time——"

The witness evidently did not want the jury to believe that he had customarily disobeyed rule 107 and it is submitted that, even if his testimony be taken as showing that he had customarily disregarded rule 107, there is nothing in this witness' testimony to show that any other employes of the defendant were either instructed in the way he claimed he was, or acted as he says he did. His testimony did not, in fact, raise any issue for the defendant to meet, whereas, if the defendant had gone into answering testimony, Bartlett would probably have been recalled to enlarge his statements.

Carrigan, plaintiff's own witness, said it was customary to find yard engines on main tracks, in yard limits, and it was necessary to be on the lookout for them, when running with an extra train (Record, page 71). It is to be noted that there was not a line of testimony referring to any one official of the defendant company as cognizant of Bartlett's alleged practice and it is submitted that the Circuit Court of Appeals was entirely right in holding that there was no evidence to submit to the jury of such continued infractions of the defendant's rules as to charge defendant's officers with knowledge thereof and to amount to an abrogation of the rules. The admission by plaintiff, at the bottom of page 27 of the brief, that "for infrequent

infractions, or such as are not open and notorious, the master is not liable," is decisive against her, and renders it unnecessary to cite any of the numerous decisions in which this rule of law has been declared or approved.

The contention that Carrigan, conductor of decedent's train, by his conduct, confirmed Bartlett's testimony, will not on examination be sustained. Carrigan was in the caboose at the rear end of the train with Bartlett at the time of the accident. (See Record, pp. 35 and 63.) While he testified that the train was running from eighteen to twenty miles an hour (Record, p. 67) and that the weather was foggy at places (Record, p. 67), he likewise testified that this was the first yard limit reached after leaving Mauch Chunk (pp. 67-8), and, as this collision was soon after entering the yard, it is not at all certain that he knew that the yard had been entered. Inasmuch as he was at the rear end of the train, he could not tell how far his engineer could see. In testifying as to the manner in which it was proper to run into yard limits, he testified for Mr. Koons, as follows (Record, p. 72):

"Q. You say you must look out for yard trains?

A. Yard trains; yes, sir.

Q. Does that mean, when you come into the yard limits you are to stop your train?

A. No, sir.

Q. You proceed, do you not?

A. Proceed.

Q. According to what?

A. According to how far you can see ahead, with safety."

While perhaps it may be inferred that he knew that they had entered the yard, from this testimony (Record, p. 66):

"Q. Did you see these two semaphores above the cross-over, as you went along ?

A. I saw them as we passed; yes, sir.
Q. What did they show?
A. They showed danger."

In answer to the very next question, as to which semaphore showed danger, he said:

"They all showed danger on the hind end."

If, then, Carrigan thought about the matter at all, it is but natural to suppose that he assumed his engineer would not run at a rate that would prevent him from stopping within a distance in which he could see, or was expecting the engineer the very next moment to apply the brakes and bring the train under control. It is true that conductor Carrigan did not say that he had become alarmed or concerned as to the rate of speed of the train, but he was not asked that question either by the plaintiff or the defendant and he certainly did say that, since his train was an extra train, he did not have the right of way in yard limits. But, suppose Carrigan had tried to have the speed of the train reduced, how could he have brought this about? Obviously, he could not have communicated with Young by hand signal, owing to the fog, nor by any call or shout, owing to the length of the train, and, in the absence of any evidence of other means of communication, such as the bell cord on passenger trains, or of a duty on the part of the defendant company, because of a general custom on the part of railroad companies, to provide such means of communication, there is no basis in the evidence for any argument that Carrigan should or could have communicated with Young. While, therefore, the engineer under the company's rules was subject to the orders of the conductor, as suggested by plaintiff (brief, p. 29), it does not appear from the evidence that the conductor could have given any orders from the rear end of the train, and, apart from general instructions given to the en-

gineer at the beginning of the run or at such times as the conductor was at the front of the train, the actual speed of the train was necessarily subject to the control of the engineer alone.

The question referred to at page 30 of plaintiff's brief, namely, as to whether or not there was a whistling post 745 feet west of the crossover, at which extra train 184 should have whistled, is not of sufficient importance to require much discussion. An examination of the testimony will show that Bartlett admitted on cross-examination that he did not know much about the distances and did not really know whether or not there was a whistling post west of the crossover, saying (Record, p. 221): "I do not know. I did not see none. I could not say there was." Hammond, likewise, said he did not see any (Record, pp. 215-16), whereas division superintendent Curwin swore positively that the whistling post was there and that it was about 800 feet west of the crossover (Record, pp. 164 and 170-171) and the surveyor, Day, fixed the exact location as 745 feet west of the crossover. Curwin saw the whistling post on the day of the accident, between eleven and twelve o'clock, or about four hours after the accident happened.

5. THE CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE DOCTRINE OF ASSUMPTION OF RISK WAS INAPPLICABLE TO THIS CASE.

Defendant concedes plaintiff's fifth point.

6. THE CIRCUIT COURT OF APPEALS ERRED IN ENTERING JUDGMENT FOR THE DEFENDANT N. O. V.

Defendant concedes plaintiff's sixth point. This concession is limited, however, to the extent of the effect of the decision by this court in Slocum vs. New

York Life Insurance Company, 228 U. S. 364. As a result of that decision it appears that the Circuit Court of Appeals should, instead of directing judgment to be entered for the defendant, have directed a new trial to be granted. Defendant denies, however, plaintiff's concluding contention (brief, pp. 35-36) that the record as a whole shows that the case was one for the jury and it is submitted that, if the first four questions herein discussed be decided in defendant's favor, the trial court should have directed the jury to find a verdict for the defendant. It is respectfully submitted, therefore, that this court, in reversing the judgment of the Circuit Court of Appeals, because it directed judgment n. o. v. to be entered in favor of the defendant, should send the case back for a new trial, after deciding the questions of law presented by the first four points in defendant's favor, so that, upon similar evidence on a new trial, the trial court will recognize its duty to direct the jury to find a verdict in favor of the defendant.

ARTHUR W. RINKE,
ARTHUR G. DICKSON,
Attorneys for Defendant in Error.